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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Document Number AMS–TM–07–0136; TM–07–14FR]

RIN 0581–AC77

National Organic Program (NOP); Sunset Review (2011)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule addresses recommendations submitted to the Secretary of Agriculture (Secretary) by the National Organic Standards Board (NOSB) on November 5, 2009, and April 29, 2010. The recommendations addressed in this final rule pertain to the continued exemption (use) of 12 substances in organic production and handling. Consistent with the recommendations from the NOSB, this final rule continues the exemption (use) of 12 substances (along with any restrictive annotations) on the U.S. Department of Agriculture's (USDA) National List of Allowed and Prohibited Substances (National List).

DATES: *Effective Date:* This final rule becomes effective September 12, 2011.

FOR FURTHER INFORMATION CONTACT: Melissa Bailey, PhD, Director, Standards Division, *Telephone:* (202) 720–3252; *Fax:* (202) 205–7808.

SUPPLEMENTARY INFORMATION:

I. Background

The Organic Foods Production Act of 1990 (OFPA), 7 U.S.C. 6501 *et seq.,* authorizes the establishment of the National List of Allowed and Prohibited Substances (National List). The National List identifies synthetic substances that may be used in organic production and nonsynthetic (natural) substances that are prohibited in organic crop and livestock production. The National List also identifies nonagricultural nonsynthetic, nonagricultural synthetic and nonorganic agricultural substances that may be used in organic handling.

The exemptions and prohibitions granted under the OFPA are required to be reviewed every 5 years by the National Organic Standards Board (NOSB). The Secretary of Agriculture has authority under the OFPA to renew such exemptions and prohibitions. If they are not reviewed by the NOSB within 5 years of their inclusion on the National List and renewed by the Secretary, their authorized use or prohibition expires. This means that synthetic substances Hydrogen chloride (CAS # 7647–01–0) and Ferric phosphate (CAS # 10045–86–0), currently allowed for use in organic crop production, will no longer be allowed for use after the sunset date, September 12, 2011. This also means that Egg white lysozyme (CAS # 9001–63–2), L-Malic acid (CAS # 97–67–6), Microorganisms, Activated charcoal (CAS #s 7440–44–0; 64365–11–3), Cyclohexylamine (CAS # 108–91–8), Diethylaminoethanol (CAS # 100–37–8), Octadecylamine (CAS # 124–30–1), Peracetic acid/Peroxyacetic acid (CAS # 79–21–0), Sodium acid pyrophosphate (CAS # 7758–16–9), and Tetrasodium pyrophosphate (CAS # 7722–88–5), currently allowed for use in organic handling, will no longer be allowed for use after the sunset date, September 12, 2011.

This final rule reflects recommendations submitted to the Secretary by the NOSB concerning the continued use of 12 substances on the National List in organic production and handling. Consistent with the recommendations from the NOSB, this final rule renews 12 exemptions on the National List (along with any restrictive annotations).

Under the authority of the OFPA, as amended (7 U.S.C. 6501 *et seq.*), the National List can be amended by the Secretary based on recommendations developed by the NOSB. Since established, the NOP has published fourteen amendments to the National List: October 31, 2003 (68 FR 61987); November 3, 2003 (68 FR 62215); October 21, 2005 (70 FR 61217); June 7, 2006 (71 FR 32803); September 11, 2006 (71 FR 53299); June 27, 2007 (72 FR 35137); October 16, 2007 (72 FR 58469); December 10, 2007 (72 FR 69569); December 12, 2007 (72 FR 70479); September 18, 2008 (73 FR 54057); October 9, 2008 (73 FR 59479); July 6, 2010 (75 FR 38693); August 24, 2010 (75 FR 51919); and December 13, 2010 (75 FR 77521). Additionally, proposed amendments to the National List were published on November 8, 2010 (75 FR 68505), and a final rule affirming a previous amendment was published on March 14, 2011 (76 FR 13504).

II. Overview of Renewals

The following provides an overview of the renewals for designated sections of the National List regulations:

Renewals

This final rule continues the exemptions at § 205.601, along with any restrictive annotations for the following synthetic substances allowed for use in organic crop production: Ferric phosphate (CAS # 10045–86–0); and Hydrogen chloride (CAS # 7647–01–0). This final rule continues the exemptions at § 205.605(a), along with any restrictive annotations, for the following nonsynthetic, nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients or food groups(s))'': Egg white lysozyme (CAS # 9001–63–2); L-Malic acid (CAS # 97–67–6); and Microorganisms. This final rule continues the exemptions at § 205.605(b), along with any restrictive annotations, for the following synthetic, nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients or food groups(s))'': Activated charcoal (CAS #s 7440–44–0; 64365–11–3); Cyclohexylamine (CAS # 108–91–8); Diethylaminoethanol (CAS # 100–37–8); Octadecylamine (CAS # 124–30–1); Peracetic acid/Peroxyacetic acid (CAS # 79–21–0); Sodium acid pyrophosphate (CAS # 7758–16–9); and Tetrasodium pyrophosphate (CAS # 7722–88–5).

Nonrenewals

The NOSB determined that a continuing need was demonstrated for the authorization of the 12 exemptions. In addition, most comments received on the proposed rule (76 FR 2880)

supported renewal of all 12 exemptions. Accordingly, there are no nonrenewals.

III. Related Documents

One advanced notice of proposed rulemaking with request for comments was published in the **Federal Register** on March 14, 2008 (73 FR 13795), to make the public aware that the allowance for 12 synthetic and nonsynthetic substances in organic production and handling will expire, if not reviewed by the NOSB and renewed by the Secretary. The proposed rule for this final rule was published in the **Federal Register** on January 4, 2011 (76 FR 288).

IV. Statutory and Regulatory Authority

The OFPA, as amended (7 U.S.C. 6501 *et seq.*), authorizes the Secretary to make amendments to the National List based on proposed amendments developed by the NOSB. Sections 6518(k)(2) and 6518(n) of OFPA authorize the NOSB to develop proposed amendments to the National List for submission to the Secretary and establish a petition process by which persons may petition the NOSB for the purpose of having substances evaluated for inclusion on or deletion from the National List. The National List petition process is implemented under § 205.607 of the NOP regulations. The current petition process (72 FR 2167, January 18, 2007) can be accessed through the NOP Web site at *http://www.ams.usda.gov/AMSv1.0/.*

A. Executive Order 12866

This action has been determined not significant for purposes of Executive Order 12866, and therefore, has not been reviewed by the Office of Management and Budget.

B. Executive Order 12988

Executive Order 12988 instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system. This final rule is not intended to have a retroactive effect.

States and local jurisdictions are preempted under the OFPA from creating programs of accreditation for private persons or State officials who want to become certifying agents of organic farms or handling operations. A governing State official would have to apply to USDA to be accredited as a certifying agent, as described in § 2115(b) of the OFPA (7 U.S.C. 6514(b)). States are also preempted under §§ 2104 through 2108 of the OFPA (7 U.S.C. 6503 through 6507) from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA.

Pursuant to § 2108(b)(2) of the OFPA (7 U.S.C. 6507(b)(2)), a State organic certification program may contain additional requirements for the production and handling of organically produced agricultural products that are produced in the State and for the certification of organic farm and handling operations located within the State under certain circumstances. Such additional requirements must: (a) Further the purposes of the OFPA, (b) not be inconsistent with the OFPA, (c) not be discriminatory toward agricultural commodities organically produced in other States, and (d) not be effective until approved by the Secretary.

Pursuant to § 2120(f) of the OFPA (7 U.S.C. 6519(f)), this final rule would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspections Act (21 U.S.C. 451 *et seq.*), or the Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 *et seq.*), nor the authority of the Administrator of EPA under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 *et seq.*).

Section 2121 of the OFPA (7 U.S.C. 6520) provides for the Secretary to establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that adversely affects such person or is inconsistent with the organic certification program established under this title. The OFPA also provides that the U.S. District Court for the district in which a person is located has jurisdiction to review the Secretary's decision.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) requires agencies to consider the economic impact of each rule on small entities and evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities or erecting barriers that would restrict their ability to compete in the market. The purpose is to fit regulatory actions to the scale of businesses subject to the action. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Pursuant to the requirements set forth in the RFA, the AMS performed an economic impact analysis on small entities in the final rule published in the **Federal Register** on December 21, 2000 (65 FR 80548). The AMS has also considered the economic impact of this action on small entities. The impact on entities affected by this final rule would not be significant. The effect of this final rule would be to allow the continued use of additional substances in agricultural production and handling. The AMS concludes that the economic impact of this addition of allowed substances, if any, would be minimal and beneficial to small agricultural service firms. Accordingly, USDA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Small agricultural service firms, which include producers, handlers, and accredited certifying agents, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000 and small agricultural producers are defined as those having annual receipts of less than $750,000.

According to USDA, Economic Research Service (ERS) data based on information from USDA-accredited certifying agents, the number of certified U.S. organic crop and livestock operations totaled nearly 13,000 and certified organic acreage exceeded 4.8 million acres in 2008.[1] ERS, based upon the list of certified operations maintained by the NOP, estimated the number of certified handling operations was 3,225 in 2007.[2] AMS believes that most of these entities would be considered small entities under the criteria established by the SBA.

The U.S. sales of organic food and beverages have grown from $3.6 billion in 1997 to nearly $21.1 billion in 2008.[3] The organic industry is viewed as the fastest growing sector of agriculture, representing over 3 percent of overall

[1] U.S. Department of Agriculture, Economic Research Service. 2009. *Data Sets: U.S. Certified Organic Farmland Acreage, Livestock Numbers and Farm Operations, 1992–2008. http://www.ers.usda.gov/Data/Organic/*

[2] U.S. Department of Agriculture, Economic Research Service, 2009. *Data Sets: Procurement and Contracting by Organic Handlers: Documentation. http://www.ers.usda.gov/Data/OrganicHandlers/Documentation.htm.*

[3] Dimitri, C., and L. Oberholtzer. 2009. *Marketing U.S. Organic Foods: Recent Trends from Farms to Consumers,* Economic Information Bulletin No. 58, U.S. Department of Agriculture, Economic Research Service, *http://www.ers.usda.gov/Publications/EIB58.*

food sales in 2009. Between 1990 and 2008, organic food sales historically demonstrated a growth rate between 15 to 24 percent each year. In 2010, organic food sales grew 7.7%.[4]

In addition, USDA has 94 accredited certifying agents who provide certification services to producers and handlers. A complete list of names and addresses of accredited certifying agents may be found on the AMS NOP Web site, at *http://www.ams.usda.gov/nop.* AMS believes that most of these accredited certifying agents would be considered small entities under the criteria established by the SBA.

D. Paperwork Reduction Act

No additional collection or recordkeeping requirements are imposed on the public by this final rule. Accordingly, OMB clearance is not required by § 350(h) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.,* or OMB's implementing regulations at 5 CFR part 1320.

E. Comments Received on Proposed Rule AMS–TM–07–0136

AMS received nine comments on proposed rule AMS–TM–07–0136. Comments were received from an organic producer, trade associations, handlers, and private citizens. Most comments expressed positions in support of the 12 substances considered under this sunset review. One individual did not refer to subjects within the scope of this rulemaking.

Some commenters specifically supported substances that they promote, represent, or rely on. A comment submitted in support of Ferric phosphate emphasized the importance of the substance to reduce snail damage on organic crops. A comment received on Hydrogen chloride voiced that there are no good alternatives to the use of the substance for removal of residual lint from ginned cottonseed, a process necessary to facilitate mechanical planting. A comment received on Egg white lysozyme stated that the substance is essential for organic wine production. A comment submitted in support of L-Malic acid underscored that no alternatives exist for this substance and stated its importance as a processing aid for pH adjustment in organic products. Multiple comments received on Microorganisms emphasized the critical need for microorganisms in organic food processing for production of dairy, bread, fruit, vegetable, and meat products. Comments received in support of the allowance for Activated charcoal confirmed the necessity of this substance as a filtering aid in organic processing. Comments submitted supporting the allowance for the substances Cyclohexylamine, Diethylaminoethanol, and Octadecylamine, all boiler water additives, stated that these substances are important for packaging sterilization. Comments supporting the use of Peracetic acid/Peroxyacetic acid for sanitizing food contact surfaces indicated that there are no alternative materials with equivalent functionality. One comment submitted in support of Sodium acid pyrophosphate stated that without the allowance for this substance as a leavening agent, many organic baked goods would no longer be available because a satisfactory alternative does not exist. The same commenter also emphasized the necessity of Tetrasodium pyrophosphate in the manufacturing of meat analog products to facilitate proper flow in the extrusion process and ensure the development of suitable product texture. Overall, at least one comment was received in favor of renewal for all 12 substances considered under this sunset review.

Changes Requested But Not Made

One commenter opposed the continued use of six of the 12 substances: Cyclohexylamine, Diethylaminoethanol, Octadecylamine, Peracetic acid/Peroxyacetic acid, Sodium acid pyrophosphate, and Tetrasodium pyrophosphate. The commenter based their objection on the safety of the substances as described in the material safety data sheets (MSDS) for each substance and recommended removal of these substances from the National List. However, the NOSB reviewed these substances against the evaluation criteria in 7 U.S.C. 6517 and 6518 of the OFPA, and found that when these substances are used as limited by the annotations for each substance, they do not pose any danger to the environment or to manufacturing personnel or consumers. The NOSB concluded that these substances remain essential to organic production since no organic alternatives exist and recommended that the exemption for these substances on the National List continue. The NOP concurs with the NOSB's evaluation and recommendation of these substances and, therefore, does not find that sufficient information was provided by the commenter to justify the removal of these substances from the National List.

F. Effective Date

This final rule reflects recommendations submitted to the Secretary by the NOSB for the purpose of fulfilling the requirements of 7 U.S.C. 6517(e) of the OFPA. Section 7 U.S.C. 6517(e) requires the NOSB to review each substance on the National List within 5 years of its publication. The substances being reauthorized for use on the National List were initially authorized for use in organic agriculture on September 12, 2006. Because these substances are critical to organic production and handling operations, producers and handlers should be able to continue to use these substances for a full 5-year period beyond their expiration date of September 12, 2011.

Accordingly, pursuant to 5 U.S.C. 553, it is found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register**. This rule shall be effective on September 12, 2011.

List of Subjects in 7 CFR Part 205

Administrative practice and procedure, Agriculture, Animals, Archives and records, Imports, Labeling, Organically produced products, Plants, Reporting and recordkeeping requirements, Seals and insignia, Soil conservation.

The authority citation for 7 CFR part 205 continues to read as follows:

Authority: 7 U.S.C. 6501–6522.

Dated: July 28, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–19659 Filed 8–2–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1307; Directorate Identifier 2010–NM–049–AD; Amendment 39–16671; AD 2011–09–09]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Model CL–600–2A12 (CL–601) and CL–600–2B16 (CL–601–3A, CL–601–3R, and CL–604 Variants) Airplanes

Correction

In rule document 2011–17402 appearing on page 41653–41657, in the issue of Friday, July 15, 2011, make the following correction:

[4] Organic Trade Association's *2011 Organic Industry Survey, http://www.ota.com.*

39—AIRWORTHINESS DIRECTIVES

§ 39.13 [Corrected]

On page 41655, in the second table, Table 2—Initial Compliance Times for Airworthiness Limitations Tasks, a fourth column title was inadvertently printed above the words ''Within 240 Flight hours after the effective date of this AD.'' The table should appear as set forth below.

TABLE 2—INITIAL COMPLIANCE TIMES FOR AIRWORTHINESS LIMITATIONS TASKS

Bombardier, Inc. model—	Task(s)—	Initial compliance time (whichever occurs later)—	
CL–600–2A12 (CL–601) airplanes, serial numbers 3001 through 3066 inclusive; and CL–600–2B16 (CL–601–3A and CL–601–3R Variants) airplanes, serial numbers 5001 through 5194 inclusive; on which Bombardier Service Bulletin 601–0590 has been accomplished.	30–11–00–101, Wing Anti-icing ...	Prior to the accumulation of 4,800 total flight hours; or within 4,800 flight hours after accomplishing Task 30–11–06–204 in Section 5–20–15 of the applicable Time Limits/Maintenance Checks manual specified in table 1 of this AD; whichever occurs later.	Within 240 flight hours after the effective date of this AD.
CL–600–2A12 (CL–601) airplanes, serial numbers 3001 through 3066 inclusive; and CL–600–2B16 (CL–601–3A and CL–601–3R Variants) airplanes, serial numbers 5001 through 5194 inclusive; on which Bombardier Service Bulletin 601–0590 has been accomplished.	30–11–00–102, Wing Anti-icing ...	Prior to the accumulation of 4,800 total flight hours; or within 4,800 flight hours after accomplishing Task 30–13–00–205 in Section 5–20–15 of the applicable Time Limits/Maintenance Checks manual specified in table 1 of this AD; whichever occurs later.	Within 240 flight hours after the effective date of this AD.
CL–600–2B16 (CL–604 Variants) airplanes, serial numbers 5301 through 5665 inclusive.	30–11–00–101, Detailed Inspection of the Wing Anti-Ice Duct Piccolo-Tube, and 36–21–00–101, Functional Test of the Leading Edge Thermal Switches.	Prior to the accumulation of 6,400 total flight hours; except for airplanes having 6,400 total flight hours or more as of the effective date of this AD on which the task has not been accomplished: prior to the next scheduled 6,400 flight hour task inspection or prior to the next scheduled accomplishment of Task 57–10–00–208 in the applicable Time Limits/Maintenance Checks manual specified in table 1 of this AD, whichever occurs first.	Within 320 flight hours after the effective date of this AD.
CL–600–2B16 (CL–604 Variants) airplanes, serial numbers 5701 and subsequent.	30–11–00–101, Detailed Inspection of the Wing Anti-Ice Duct Piccolo-Tube, and 36–21–00–101, Functional Test of the Leading Edge Thermal Switches.	Prior to the accumulation of 6,400 total flight hours.	Within 320 flight hours after the effective date of this AD.

[FR Doc. C1–2011–17402 Filed 7–28–11; 8:45 am]

BILLING CODE 1505–01–D

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Chapter II

[CPSC Docket No. CPSC–2011–0050]

Third Party Testing for Certain Children's Products; Toys: Requirements for Accreditation of Third Party Conformity Assessment Bodies

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of requirements.

SUMMARY: The Consumer Product Safety Commission (''CPSC,'' ''Commission,'' or ''we'') is issuing a notice of requirements that provides the criteria and process for Commission acceptance of accreditation of third party conformity assessment bodies for testing, pursuant to ASTM International's (formerly the American Society for Testing and Materials) (''ASTM'') *Standard Consumer Safety Specification for Toy Safety,* F 963–08 (''ASTM F 963–08''), and section 4.27 (toy chests) from ASTM International's F 963–07ε1 version of the standard (''ASTM F 963–07ε1''), which are the consumer product safety standards for toys, pursuant to section 106 of the Consumer Product Safety Improvement Act of 2008 (CPSIA), Public Law 110–314. The Commission is issuing this notice of requirements pursuant to section 14(a)(3)(B)(vi) of the Consumer Product Safety Act (CPSA).

DATES: *Effective Date:* The requirements for accreditation of third party conformity assessment bodies to assess conformity with ASTM F 963–08 and/or section 4.27 of ASTM F 963–07ε1 are effective August 3, 2011.[1]

Comments in response to this notice of requirements should be submitted by September 2, 2011. Comments on this notice should be captioned ''Third party Testing for Certain Children's Products; Toys: Requirements for Accreditation of

[1] The Commission voted 5–0 to publish this notice of requirements. Chairman Inez M. Tenenbaum, Commissioner Nancy A. Nord, and Commissioner Robert S. Adler each issued a statement, and the statements can be found at *http://www.cpsc.gov/pr/statements.html.*

Third party Conformity Assessment Bodies.''

ADDRESSES: You may submit comments, identified by Docket No. CPSC–2011–0050, by any of the following methods:

Electronic Submissions: Submit electronic comments in the following way:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. To ensure timely processing of comments, the Commission is no longer accepting comments submitted by electronic mail (e-mail) except through *http://www.regulations.gov.*

Written Submissions: Submit written submissions in the following ways: Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions) preferably in five copies, to: Office of the Secretary, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. Do not submit confidential business information, trade secret information, or other sensitive or protected information (such as a Social Security Number) electronically; if furnished at all, such information should be submitted in writing.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Richard McCallion, Team Leader for the Mechanical, Recreation, and Sports Program Area, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814; e-mail *RMcCallion@cpsc.gov.* CPSC intends to issue a **Federal Register** notice providing information about its proposed education and outreach plan for stakeholders directly affected by the Notice of Requirements for Third Party Testing for Certain Children's Products. The Federal Register notice will also request public comment and input. Many of the informative materials for stakeholders will be available at a dedicated toy safety standard webpage: *http://www.cpsc.gov/toysafety.*

SUPPLEMENTARY INFORMATION:

I. Introduction

Section 14(a)(3)(B)(vi) of the CPSA, as added by section 102(a)(2) of the CPSIA, directs the CPSC to publish a notice of requirements for accreditation of third party conformity assessment bodies to assess children's products for conformity with ''other children's product safety rules.'' Section 14(f)(1) of the CPSA defines ''children's product safety rule'' as ''a consumer product safety rule under [the CPSA] or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance.'' Under section 14(a)(3)(A) of the CPSA, each manufacturer (including the importer) or private labeler of products subject to those regulations must have products that are manufactured more than 90 days after the **Federal Register** publication date of a notice of the requirements for accreditation, tested by a third party conformity assessment body accredited to do so, and must issue a certificate of compliance with the applicable regulations based on that testing. Section 14(a)(2) of the CPSA, as added by section 102(a)(2) of the CPSIA, requires that certification be based on testing of sufficient samples of the product, or samples that are identical in all material respects to the product. The Commission also emphasizes that, irrespective of certification, the product in question must comply with applicable CPSC requirements (*see, e.g.,* section 14(h) of the CPSA, as added by section 102(b) of the CPSIA).

This notice provides the criteria and process for Commission acceptance of accreditation of third party conformity assessment bodies for testing toys, pursuant to ASTM F 963–08, and for testing toy chests, pursuant to section 4.27 of ASTM F 963–07ε1. ASTM F 963–08 and section 4.27 of ASTM F 963–07ε1 are voluntary standards, but under section 106(a) of the CPSIA, they have become mandatory federal requirements, ''except for section 4.2 and Annex 4 [of ASTM F 963], or any provision that restates or incorporates an existing mandatory standard or ban promulgated by the Commission or by statute.'' Readers may obtain a copy of ASTM F 963–08 and/or ASTM F 963–07ε1 from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA, 19428–2959; (610)-832–9500; *http://www.astm.org.*

Section 106(a) of the CPSIA states that, beginning 180 days after August 14, 2008—the date the CPSIA was enacted—ASTM F 963–07 shall be considered a consumer product safety standard issued by the Commission under section 9 of the CPSA. Under section 106(g) of the CPSIA, when ASTM proposes to revise ASTM F 963, it must notify the Commission of the proposed revision. The revised standard will be considered the consumer product safety standard effective 180 days after the date on which ASTM notified the Commission of the revision, unless the Commission objects within the first 90 days of the 180-day period. If the Commission determines that the proposed revision does not improve the safety of a consumer product, the Commission can notify ASTM that the already-existing standard will continue to be considered the consumer product safety standard.

ASTM proposed F 963–08 as a revised standard in February 2009, and on May 13, 2009, the Commission voted to accept F 963–08 as the consumer product safety standard for toys, except the revision omitting section 4.27 related to toy chests, which the Commission retained from the previous version of F 963 (ASTM F 963–07ε1). Accordingly, ASTM F 963–08 and section 4.27 of ASTM F 963–07ε1 (toy chests) are considered consumer product safety standards issued by the Commission under section 9 of the CPSA.

We anticipate the ASTM F963–08 standard is likely to be revised and updated in the future. Given this possibility, the Commission seeks comments now on how to make the transition in testing requirements as clear and efficient as possible should the standard change.

We note that ordinarily, when the Commission bases a mandatory requirement on a voluntary standard, we incorporate the voluntary standard by reference, in accordance with the rules of the Office of the Federal Register. *See* 1 CFR part 51. However, in this instance, ASTM F 963 became a consumer product safety standard by operation of law, rather than by an act of the Commission. *See* Public Law No. 110–314 § 106(a), (g). Therefore the Commission does not need to incorporate ASTM F 963 by reference.

We also note that certain provisions of ASTM F 963–08 and section 4.27 of ASTM F 963–07ε1 will not be subject to third party testing and therefore we will not be accepting accreditations to those excepted sections. The exceptions are as follows:

- Those sections of ASTM F 963–08 that address food and cosmetics, products traditionally outside the Commission's jurisdiction.
- Those sections of ASTM F 963–08 that pertain to the manufacturing process and thus, cannot be evaluated meaningfully by a test of the finished product (e.g., the purified water provision at section 4.3.6.1).

• Requirements for labeling, instructional literature, or producer's markings in ASTM F 963–08 or section 4.27 of ASTM F 963–07ε1. We have taken similar positions in other contexts. For example, the Commission has stated that it will not require testing and certification to the labeling requirements under the Federal Hazardous Substances Act, 15 U.S.C. 1261–1278. *See* 74 FR 68588, 68591 (Dec. 28, 2009) (Notice of Commission Action on the Stay of Enforcement of Testing and Certification Requirements). We also do not require third party testing for the labeling requirements for children's sleepwear under the Flammable Fabrics Act, 15 U.S.C. 1191–1204. *See* 75 FR 70911, 70913 (Nov. 19, 2010) (Third Party Testing for Certain Children's Products; Children's Sleepwear, Sizes 0 Through 6X and 7 Through 14: Requirements for Accreditation of Third Party Conformity Assessment Bodies).

• Those sections of ASTM F 963–08 that involve assessments that are conducted by the unaided eye and without any sort of tool or device.

• Section 4.3.8 of ASTM F 963–08, pertaining to a specific phthalate, because section 108 of the CPSIA specifically addresses phthalates and will be the subject of a separate notice of requirements.

In sum, the Commission will only require certain provisions of ASTM F 963–08 and Section 4.27 of ASTM F 963–07ε1 to be subject to third party testing and therefore we will only accept the accreditation of third party conformity assessment bodies for testing under the following toy safety standards:

• ASTM F 963–07ε1

—Section 4.27—Toy Chests (except labeling and/or instructional literature requirements)

• ASTM F 963–08

—Section 4.3.5.2, Surface Coating Materials—Soluble Test for Metals [2]
—Section 4.3.6.3, Cleanliness of Liquids, Pastes, Putties, Gels, and Powders (except for cosmetics and tests on formulations used to prevent microbial degradation)
—Section 4.3.7, Stuffing Materials
—Section 4.5, Sound Producing Toys
—Section 4.6, Small Objects (except labeling and/or instructional literature requirements)
—Section 4.7, Accessible Edges (except labeling and/or instructional literature requirements)
—Section 4.8, Projections
—Section 4.9, Accessible Points (except labeling and/or instructional literature requirements)
—Section 4.10, Wires or Rods
—Section 4.11, Nails and Fasteners
—Section 4.12, Packaging Film
—Section 4.13, Folding Mechanisms and Hinges
—Section 4.14, Cords, Straps, and Elastics
—Section 4.15, Stability and Overload Requirements
—Section 4.16, Confined Spaces
—Section 4.17, Wheels, Tires, and Axles
—Section 4.18, Holes, Clearances, and Accessibility of Mechanisms
—Section 4.19, Simulated Protective Devices (except labeling and/or instructional literature requirements)
—Section 4.20.1, Pacifiers with Rubber Nipples/Nitrosamine Test
—Section 4.20.2, Toy Pacifiers
—Section 4.21, Projectile Toys
—Section 4.22, Teethers and Teething Toys
—Section 4.23.1, Rattles with Nearly Spherical, Hemispherical, or Circular Flared Ends
—Section 4.24, Squeeze Toys
—Section 4.25, Battery-Operated Toys (except labeling and/or instructional literature requirements)
—Section 4.26, Toys Intended to Be Attached to a Crib or Playpen (except labeling and/or instructional literature requirements)
—Section 4.27, Stuffed and Beanbag-Type Toys
—Section 4.30, Toy Gun Marking
—Section 4.32, Certain Toys with Spherical Ends
—Section 4.35, Pompoms
—Section 4.36, Hemispheric-Shaped Objects
—Section 4.37, Yo-Yo Elastic Tether Toys
—Section 4.38, Magnets (except labeling and/or instructional literature requirements)
—Section 4.39, Jaw Entrapment in Handles and Steering Wheels

We note that the ASTM toy safety standards cover toys intended for use by children under 14 years of age. *See, e.g.,* section 1.3 of ASTM F 963–08. However, only ''children's products'' are required to be third party tested in support of the children's product certificate required by section 14(a)(2) of the CPSA. Section 3(a)(2) of the CPSA defines ''children's product,'' to mean, *inter alia,* ''a consumer product designed or intended primarily for children 12 years of age or younger.'' To the extent that there are products subject to ASTM F 963–08 and/or section 4.27 of ASTM F 963–07ε1 that are not ''children's products,'' as that term is defined in the CPSA, such products do not need to be third party tested in support of the certification required by section 14 of the CPSA.

Although section 14(a)(3)(B)(vi) of the CPSA directs the CPSC to publish a notice of requirements for accreditation of third party conformity assessment bodies to assess conformity with ''all other children's product safety rules,'' this notice of requirements is limited to the safety standards identified immediately above.

The CPSC also recognizes that section 14(a)(3)(B)(vi) of the CPSA is captioned: ''All Other Children's Product Safety Rules''; however, the body of the statutory requirement refers only to ''other children's product safety rules.'' Nevertheless, section 14(a)(3)(B)(vi) of the CPSA could be construed to require a notice of requirements for ''all'' other children's product safety rules, rather than a notice of requirements for ''some'' or ''certain'' children's product safety rules. However, whether a particular rule represents a ''children's product safety rule'' may be subject to interpretation, and Commission staff is continuing to evaluate which rules, regulations, standards, or bans are ''children's product safety rules.'' The CPSC intends to issue additional notices of requirements for other rules that the Commission determines to be ''children's product safety rules.''

This notice of requirements applies to all third party conformity assessment bodies as described in section 14(f)(2) of the CPSA. Generally speaking, such third party conformity assessment bodies are: (1) Third party conformity assessment bodies that are not owned, managed, or controlled by a manufacturer or private labeler of a children's product to be tested by the third party conformity assessment body for certification purposes; (2) ''firewalled'' conformity assessment bodies (those that are owned, managed, or controlled by a manufacturer or private labeler of a children's product to be tested by the third party conformity assessment body for certification purposes and that seek accreditation under the additional statutory criteria for ''firewalled'' conformity assessment bodies); and (3) third party conformity assessment bodies owned or controlled, in whole or in part, by a government.

The Commission requires baseline accreditation of each category of third party conformity assessment body to the International Organization for Standardization (ISO)/International Electrotechnical Commission (IEC) Standard 17025:2005, ''General Requirements for the Competence of Testing and Calibration Laboratories.'' The accreditation must be by an accreditation body that is a signatory to the International Laboratory Accreditation Cooperation–Mutual Recognition Arrangement (ILAC–MRA), and the scope of the accreditation must include clear references to those

[2] Products subject to 16 CFR part 1303, *Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint,* that have been tested by a CPSC-accepted third party conformity assessment body and found not to exceed the lead limit in 16 CFR part 1303, do not need to be tested to the lead solubility standard in section 4.3.5.2 of ASTM F 963–08.

sections of ASTM F 963–08 and/or 4.27 of ASTM F 963–07ε1 identified earlier in part I of this document for which the third party conformity assessment body seeks CPSC acceptance.

(Descriptions of the history and content of the ILAC–MRA approach and of the requirements of the ISO/IEC 17025:2005 laboratory accreditation standard are provided in the CPSC staff briefing memorandum ''Third Party Conformity Assessment Body Accreditation Requirements for Testing Compliance with 16 CFR part 1501 (Small Parts Regulations),'' dated November 2008, and available on the CPSC's Web site at: *http://www.cpsc.gov/library/foia/foia09/brief/smallparts.pdf*).

The Commission has established an electronic accreditation registration and listing system that can be accessed via its Web site at: *http://www.cpsc.gov/ABOUT/Cpsia/labaccred.html.*

The Commission stayed the enforcement of certain provisions of section 14(a) of the CPSA in a notice published in the **Federal Register** on February 9, 2009 (74 FR 6396); the stay applied to testing and certification of various products, including those covered by the safety standards in ASTM F 963. On December 28, 2009 the Commission published a notice in the **Federal Register** (74 FR 68588) revising the terms of the stay. One section of the December 28, 2009 notice addressed ''Consumer Products or Children's Products Where the Commission Is Continuing the Stay of Enforcement Until Further Notice,'' due to factors such as pending rulemaking proceedings affecting the product or the absence of a notice of requirements. The ASTM F 963 testing and certification requirements were included in that section of the December 28, 2009 notice. The absence of a notice of requirements prevented the testing and certification stay from being lifted with regard to toys subject to ASTM F 963. While the publication of this notice would have had the effect of lifting the testing and certification stay with regard to ASTM F 963, at the decisional meeting on July 20, 2011, the Commission voted to stay enforcement of the testing and certification requirements of section 14 of the CPSA with respect to toys subject to ASTM F 963 until December 31, 2011.

Accordingly, each manufacturer of a children's product covered by F 963–08 and/or section 4.27 of ASTM F 963–07ε1 (toy chests) must have any such product manufactured after December 31, 2011, tested by a third party conformity assessment body accredited to do so and must issue a certificate of compliance with applicable sections of ASTM F 963–08 and/or section 4.27 of ASTM F 963–07ε1 based on that testing. (Under the CPSA, the term ''manufacturer'' includes anyone who manufactures or imports a product.)

This notice of requirements is exempt from the notice and comment rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553 (*see* section 14(a)(3)(G) of the CPSA, as added by section 102(a)(2) of the CPSIA (15 U.S.C. 2063(a)(3)(G)).

II. Accreditation Requirements

A. Baseline Third Party Conformity Assessment Body Accreditation Requirements

For a third party conformity assessment body to be accredited to test children's products for conformity with one or more of the ASTM F 963 toy standards identified earlier in part I of this document, it must be accredited by an ILAC–MRA signatory accrediting body, and the accreditation must be registered with, and accepted by, the Commission. A listing of ILAC–MRA signatory accrediting bodies is available on the Internet at: *http://ilac.org/membersbycategory.html.* The accreditation must be to ISO Standard ISO/IEC 17025:2005, ''General Requirements for the Competence of Testing and Calibration Laboratories,'' and the scope of the accreditation must expressly include references to one or more of the following sections of ASTM F 963–08, *Standard Consumer Safety Specification for Toy Safety,* and/or 4.27 of ASTM F 963–07ε1, the consumer product safety standard for toy chests

- ASTM F 963–07ε1

—Section 4.27—Toy Chests (except labeling and/or instructional literature requirements)

- ASTM F 963–08

—Section 4.3.5.2, Surface Coating Materials—Soluble Test for Metals
—Section 4.3.6.3, Cleanliness of Liquids, Pastes, Putties, Gels, and Powders (except for cosmetics and tests on formulations used to prevent microbial degradation)
—Section 4.3.7, Stuffing Materials
—Section 4.5, Sound Producing Toys
—Section 4.6, Small Objects (except labeling and/or instructional literature requirements)
—Section 4.7, Accessible Edges (except labeling and/or instructional literature requirements)
—Section 4.8, Projections
—Section 4.9, Accessible Points (except labeling and/or instructional literature requirements)
—Section 4.10, Wires or Rods
—Section 4.11, Nails and Fasteners
—Section 4.12, Packaging Film
—Section 4.13, Folding Mechanisms and Hinges
—Section 4.14, Cords, Straps, and Elastics
—Section 4.15, Stability and Overload Requirements
—Section 4.16, Confined Spaces
— Section 4.17, Wheels, Tires, and Axles
—Section 4.18, Holes, Clearances, and Accessibility of Mechanisms
—Section 4.19, Simulated Protective Devices (except labeling and/or instructional literature requirements)
—Section 4.20.1, Pacifiers with Rubber Nipples/Nitrosamine Test
—Section 4.20.2, Toy Pacifiers
—Section 4.21, Projectile Toys
—Section 4.22, Teethers and Teething Toys
—Section 4.23.1, Rattles with Nearly Spherical, Hemispherical, or Circular Flared Ends
—Section 4.24, Squeeze Toys
—Section 4.25, Battery-Operated Toys (except labeling and/or instructional literature requirements)
—Section 4.26, Toys Intended to Be Attached to a Crib or Playpen (except labeling and/or instructional literature requirements)
—Section 4.27, Stuffed and Beanbag-Type Toys
—Section 4.30, Toy Gun Marking
—Section 4.32, Certain Toys with Spherical Ends
—Section 4.35, Pompoms
—Section 4.36, Hemispheric-Shaped Objects
—Section 4.37, Yo-Yo Elastic Tether Toys
—Section 4.38, Magnets (except labeling and/or instructional literature requirements)
—Section 4.39, Jaw Entrapment in Handles and Steering Wheels

A true copy, in English, of the accreditation and scope documents demonstrating compliance with the requirements of this notice must be registered with the Commission electronically. The additional requirements for accreditation of firewalled and governmental conformity assessment bodies are described in parts II.B and II.C of this document below.

The Commission will maintain on its Web site an up-to-date listing of third party conformity assessment bodies whose accreditations it has accepted and the scope of each accreditation. Subject to the limited provisions for acceptance of ''retrospective'' testing noted in part IV below, once the Commission adds a third party conformity assessment body to that list, the third party conformity assessment body may commence testing children's products to support the manufacturer's certification that the product complies with the applicable toy safety standards identified earlier in part I of this document.

B. Additional Accreditation Requirements for Firewalled Conformity Assessment Bodies

In addition to the baseline accreditation requirements in part II.A of this document above, firewalled conformity assessment bodies seeking

accredited status must submit to the Commission copies, in English, of their training documents, showing how employees are trained to notify the Commission immediately and confidentially of any attempt by the manufacturer, private labeler, or other interested party to hide or exert undue influence over the third party conformity assessment body's test results. This additional requirement applies to any third party conformity assessment body in which a manufacturer or private labeler of a children's product to be tested by the third party conformity assessment body owns an interest of 10 percent or more. While the Commission is not addressing common parentage of a third party conformity assessment body and a children's product manufacturer at this time, it will be vigilant to see if this issue needs to be addressed in the future.

As required by section 14(f)(2)(D) of the CPSA, the Commission must formally accept, by order, the accreditation application of a third party conformity assessment body before the third party conformity assessment body can become an accredited firewalled conformity assessment body.

C. Additional Accreditation Requirements for Governmental Conformity Assessment Bodies

In addition to the baseline accreditation requirements of part II.A of this document above, the CPSIA permits accreditation of a third party conformity assessment body owned or controlled, in whole or in part, by a government if:

- To the extent practicable, manufacturers or private labelers located in any nation are permitted to choose conformity assessment bodies that are not owned or controlled by the government of that nation;
- The third party conformity assessment body's testing results are not subject to undue influence by any other person, including another governmental entity;
- The third party conformity assessment body is not accorded more favorable treatment than other third party conformity assessment bodies in the same nation who have been accredited;
- The third party conformity assessment body's testing results are accorded no greater weight by other governmental authorities than those of other accredited third party conformity assessment bodies; and
- The third party conformity assessment body does not exercise undue influence over other governmental authorities on matters affecting its operations or on decisions by other governmental authorities controlling distribution of products based on outcomes of the third party conformity assessment body's conformity assessments.

The Commission will accept the accreditation of a governmental third party conformity assessment body if it meets the baseline accreditation requirements of part II.A of this document above, and meets the additional conditions stated here. To obtain this assurance, CPSC staff will engage the governmental entities relevant to the accreditation request.

III. How does a third party conformity assessment body apply for acceptance of its accreditation?

The Commission has established an electronic accreditation acceptance and registration system accessed via the Commission's Internet site at: *http://www.cpsc.gov/about/cpsia/labaccred.html.* The applicant provides, in English, basic identifying information concerning its location, the type of accreditation it is seeking, and electronic copies of its accreditation certificate and scope statement from its ILAC–MRA signatory accreditation body, and firewalled third party conformity assessment body training document(s), if relevant.

Commission staff will review the submission for accuracy and completeness. In the case of baseline third party conformity assessment bodies and government-owned or government-operated conformity assessment bodies, when that review and any necessary discussions with the applicant are satisfactorily completed, the third party conformity assessment body in question is added to the CPSC's list of accredited third party conformity assessment bodies at: *http://www.cpsc.gov/about/cpsia/labaccred.html.* In the case of a firewalled conformity assessment body seeking accredited status, when staff's review is complete, staff transmits its recommendation on accreditation to the Commission for consideration. (A third party conformity assessment body that may ultimately seek acceptance as a firewalled third party conformity assessment body also can initially request acceptance as a third party conformity assessment body accredited for testing of children's products other than those of its owners.) If the Commission accepts a staff recommendation to accredit a firewalled conformity assessment body, the firewalled conformity assessment body will be added to the CPSC's list of accredited third party conformity assessment bodies. In each case, the Commission will notify the third party conformity assessment body electronically of acceptance of its accreditation. All information to support an accreditation acceptance request must be provided in the English language.

Subject to the limited provisions for acceptance of ''retrospective'' testing noted in part IV of this document below, once the Commission adds a third party conformity assessment body to the list, the third party conformity assessment body may begin testing children's products to support certification of compliance with the applicable toy safety standards identified earlier in part I of this document for which it has been accredited.

IV. Limited Acceptance of Children's Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to the Commission's Acceptance of Accreditation

The Commission will accept a certificate of compliance with the applicable sections of *Standard Consumer Safety Specification for Toy Safety,* F 963–08 and/or section 4.27 (toy chests) from ASTM F 963–07ε1 based on testing performed by an accredited third party conformity assessment body (including a government-owned or -controlled conformity assessment body, and a firewalled conformity assessment body) before the Commission's acceptance of its accreditation if:

- At the time of product testing, the product was tested by a third party conformity assessment body that was ISO/IEC 17025 accredited by an accreditation body that is a signatory to the ILAC–MRA. For firewalled conformity assessment bodies, the firewalled conformity assessment body must be one that the Commission accredited, by order, at or before the time the product was tested, even though the order will not have included the test methods specified in this notice. If the third party conformity assessment body has not been accredited by a Commission order as a firewalled conformity assessment body, the Commission will not accept a certificate of compliance based on testing performed by the third party conformity assessment body before it is accredited, by Commission order, as a firewalled conformity assessment body;
- The third party conformity assessment body's application for testing to the toy standard section(s) under which the test(s) was conducted

is accepted by the CPSC on or before October 3, 2011;

• With regard to tests conducted under F 963–08, the product was tested to the applicable section(s) on or after May 13, 2009; with regard to tests conducted under section 4.27 of F 963–07ε1, the product was tested on or after August 14, 2008;

• The accreditation scope in effect for the third party conformity assessment body at the time of testing expressly included testing to the toy standard section(s) under which the test(s) was conducted;

• The test results show compliance with the applicable current toy standards; and

• The third party conformity assessment body's accreditation, including inclusion in its scope of the toy standard section(s) under which the test(s) was conducted, remains in effect through the effective date for mandatory third party testing and manufacturer certification for conformity with ASTM F 963–08 and/or section 4.27 of ASTM F 963–07ε1.

Dated: July 22, 2011.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2011–18962 Filed 8–2–11; 8:45 am]

BILLING CODE 6355–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 229, 230, 232, 239, 240, and 249

[Release No. 33–9245; 34–64975; File No. S7–18–08]

RIN 3235–AK18

Security Ratings

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: In light of the provisions of Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, we are adopting amendments to replace rule and form requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934 for securities offering or issuer disclosure rules that rely on, or make special accommodations for, security ratings (for example, Forms S–3 and F–3 eligibility criteria) with alternative requirements.

DATES: *Effective Date:* This rule is effective September 2, 2011 except for the following amendments, which are effective December 31, 2012:

• Amendatory instruction 2 amending 17 CFR 200.800;

• Amendatory instruction 4 amending 17 CFR 229.10;

• Amendatory instruction 10 amending 17 CFR 230.467;

• Amendatory instruction 11 amending 17 CFR 230.473;

• Amendatory instruction 13 amending 17 CFR 232.405;

• Amendatory instruction 21 amending 17 CFR 239.38;

• Amendatory instruction 22 amending Form F–8 [referenced in 17 CFR 239.38];

• Amendatory instruction 23 removing Form F–9 [referenced in § 239.39];

• Amendatory instruction 24 amending 17 CFR 239.40;

• Amendatory instruction 25 amending Form F–10 [referenced in 17 CFR 239.40];

• Amendatory instruction 26 amending 17 CFR 239.41;

• Amendatory instruction 27 amending Form F–80 [referenced in 17 CFR 239.41];

• Amendatory instruction 28 amending 17 CFR 239.42;

• Amendatory instruction 29 amending Form F–X [referenced in 17 CFR 239.42];

• Amendatory instruction 33 amending 17 CFR 249.240f; and

• Amendatory instruction 34 amending Form 40–F [referenced in 17 CFR 249.240f].

FOR FURTHER INFORMATION CONTACT: Blair Petrillo, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551–3430, or with respect to issuers of insurance contracts, Keith E. Carpenter, Senior Special Counsel in the Office of Disclosure and Insurance Product Regulation, Division of Investment Management, at (202) 551–6795, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to rules and forms under the Securities Act of 1933 (''Securities Act''),[1] and the Securities Exchange Act of 1934 (''Exchange Act'').[2] Under the Securities Act, we are adopting amendments to Rules 134,[3] 138,[4] 139,[5] 168,[6] Form S–3,[7] Form S–4,[8] Form F–3,[9] and Form F–4.[10] We are rescinding Form F–9 [11] and adopting amendments to the Securities Act and Exchange Act forms and rules that refer to Form F–9 to eliminate those references.[12] We are also amending Schedule 14A [13] under the Exchange Act.

I. Introduction

We are adopting amendments today to remove references to credit ratings in rules and forms promulgated under the Securities Act and the Exchange Act. On February 9, 2011, we proposed amendments in light of Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank'') [14] to remove references to credit ratings in rules and forms under the Securities Act and the Exchange Act.[15] We proposed similar changes in 2008, prior to the enactment of the Dodd-Frank Act, but did not act on those proposals.[16]

We have considered the role of credit ratings in our rules under the Securities Act on several previous occasions and even proposed removal of some references to credit ratings prior to the enactment of the Dodd-Frank Act.[17]

[1] 15 U.S.C. 77a *et seq.*

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 230.134.

[4] 17 CFR 230.138.

[5] 17 CFR 230.139.

[6] 17 CFR 230.168.

[7] 17 CFR 239.13.

[8] 17 CFR 239.25.

[9] 17 CFR 239.33.

[10] 17 CFR 239.34.

[11] 17 CFR 239.39.

[12] We are removing references to Form F–9 in Securities Act Forms F–8 [17 CFR 239.38], F–10 [17 CFR 239.40], F–80 [17 CFR 239.41], and Form F–X [17 CFR 239.42]; in Exchange Act Form 40–F [17 CFR 249.240f], and in the following rules: 17 CFR 200.800, 17 CFR 229.10, 17 CFR 230.134, 17 CFR 230.467, 17 CFR 230.473, and 17 CFR 232.405.

[13] 17 CFR 240.14a–101.

[14] Pub. L. No. 111–203, 124 Stat. 1376 (2010). Section 939A of the Dodd-Frank Act requires that we ''review any regulation issued by [us] that requires the use of an assessment of the credit-worthiness of a security or money market instrument and any references to or requirements in such regulations regarding credit ratings.'' Once we have completed that review, the statute provides that we modify any regulations identified in our review to ''remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness'' as we determine to be appropriate.

[15] *See Security Ratings,* Release No. 33–9186 (Feb. 9, 2011) [76 FR 8946] (''2011 Proposing Release'').

[16] *See Security Ratings,* Release No. 33–8940 (July 1, 2008) [73 FR 40106] (''2008 Proposing Release''). In 2009, we re-opened the comment period for the release for an additional 60 days. *See References to Ratings of Nationally Recognized Statistical Rating Organizations,* Release No. 33–9069 (Oct. 5, 2009) [74 FR 52374]. Public comments on both of these releases were published under File No. S7–18–08 and are available at *http://www.sec.gov/comments/s7-18-08/s71808.shtml.* Comments also are 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.

[17] See the 2008 Proposing Release for a discussion of the history and background of references to credit ratings in rules and regulations under the Securities Act. See also *Credit Ratings Disclosure,* Release No.

Continued

While we recognize that credit ratings play a significant role in the investment decisions of many investors, we want to avoid using credit ratings in a manner that suggests in any way a ''seal of approval'' on the quality of any particular credit rating or rating agency, including any nationally recognized statistical rating organization (''NRSRO''). Similarly, the legislative history indicates that Congress, in adopting Section 939A, intended to ''reduce reliance on credit ratings.'' [18] The rules we are adopting today seek to reduce our reliance on credit ratings for regulatory purposes while also preserving the use of Form S–3 (and similar forms) for issuers that we believe are widely followed in the market.

As discussed in more detail below, we are adopting the amendments with certain changes from the proposals. We received 48 comment letters on the 2011 Proposing Release and have modified the final amendments in certain respects in response to the comments we received.

We are adopting amendments today to revise General Instruction I.B.2. of Form S–3 and Form F–3 to provide that an offering of non-convertible securities, other than common equity, is eligible to be registered on Form S–3 and Form F–3 if:

(i) The issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) The issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) The issuer is a wholly-owned subsidiary of a well-known seasoned issuer (''WKSI'') as defined in Rule 405 under the Securities Act; [19] or

(iv) The issuer is a majority-owned operating partnership of a real estate investment trust (''REIT'') that qualifies as a WKSI; or

(v) The issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to General Instruction I.B.2 of Form S–3 or Form F–3 in existence prior to the new rules, discloses the basis for such belief, and files the final prospectus for any such offering on or before the date that is three years from the effective date of the amendments. As before today's amendments, issuers using Form S–3 or Form F–3 would also need to satisfy the other relevant requirements of Form S–3 and Form F–3, including the requirements in General Instruction I.A. of those forms.[20]

We are also rescinding Form F–9 under the Securities Act because we believe that regulatory changes have rendered the form unnecessary. Further, we are adopting amendments to Rules 138, 139 and 168 under the Securities Act and Schedule 14A under the Exchange Act so that they refer to the new eligibility criteria in Form S–3 and Form F–3. Finally, we are removing Rule 134(a)(17) under the Securities Act.

II. Discussion of the Amendments

A. Primary Offerings of Non-Convertible Securities Other Than Common Equity

1. Background of Form S–3 and Form F–3

Form S–3 and Form F–3 are the ''short forms'' used by eligible issuers to register securities offerings under the Securities Act. These forms allow eligible issuers to rely on reports they have filed under the Exchange Act to satisfy many of the disclosure requirements under the Securities Act. Form S–3 and Form F–3 eligibility for primary offerings also enables eligible issuers to conduct primary offerings ''off the shelf'' under Securities Act Rule 415.[21] Rule 415 provides considerable flexibility in accessing the public securities markets in response to changes in the market and other factors. Issuers that are eligible to register these primary ''shelf'' offerings under Rule 415 are permitted to register securities offerings prior to planning any specific offering and, once the registration statement is effective, offer securities in one or more tranches without waiting for further Commission action. To be eligible to use Form S–3 or Form F–3, an issuer must meet the form's eligibility requirements as to registrants, which generally pertain to reporting history under the Exchange Act,[22] and at least one of the form's transaction requirements.[23] One such transaction requirement permits registrants to register primary offerings of non-convertible securities, if they are rated investment grade by at least one NRSRO.[24] General Instruction I.B.2. provides that a security is ''investment grade'' if, at the time of sale, at least one NRSRO has rated the security in one of its generic rating categories, typically the four highest, which signifies investment grade.

General Instruction I.B.2. to Form S–3 provides issuers of non-convertible securities whose public float does not reach the required threshold, or that do not have a public float, with an alternate means of becoming eligible to register offerings on Form S–3. Consistent with Form S–3, the Commission also adopted a provision in Form F–3 providing for the eligibility of a primary offering of investment grade non-convertible securities by eligible foreign private issuers.[25]

Since the adoption of those rules relating to security ratings in Form S–

33–9070 (Oct. 7, 2009) [74 FR 53086], which includes a proposal to require disclosure regarding credit ratings under certain circumstances.

[18] *See* Report of the House of Representatives Financial Services Committee to Accompany H.R. 4173, H. Rep. No. 111–517 at 871 (2010). The legislative history does not, however, indicate that Congress intended to change the types of issuers and offerings that could rely on the Commission's forms.

[19] 17 CFR 230.405.

[20] We are also adopting a technical amendment to General Instruction I.B.5 of Form S–3.

[21] 17 CFR 230.415.

[22] *See* General Instruction I.A. to Forms S–3 and F–3.

[23] *See* General Instruction I.B to Forms S–3 and F–3. In addition to permitting offerings of investment grade securities, an issuer who meets the eligibility criteria in General Instruction I.A. may use Form S–3 or Form F–3 for primary offerings if the issuer has a public float in excess of $75 million, transactions involving secondary offerings, and rights offerings, dividend reinvestment plans, warrants and options. In addition, certain subsidiaries are eligible to use Form S–3 or Form F–3 for debt offerings if the parent company satisfies the eligibility requirements in General Instruction I.A. and provides a full and unconditional guarantee of the obligations being registered by the subsidiary. Pursuant to the revisions to Form S–3 and Form F–3 adopted in 2007, issuers also may conduct primary securities offerings registered on these forms without regard to the size of their public float or the rating of debt securities being offered, so long as they satisfy the other eligibility conditions of the respective forms, have a class of common equity securities listed and registered on a national securities exchange, and the issuers do not sell more than the equivalent of one-third of their public float in primary offerings over any period of 12 calendar months. *See Revisions to Eligibility Requirements for Primary Offerings on Forms S–3 and F–3,* Release No. 33–8878 (Dec. 19, 2007) [72 FR 73534].

[24] *See* General Instruction I.B.2. to Forms S–3 and F–3.

[25] General Instruction I.B.2. of Form F–3. *See Adoption of Foreign Issuer Integrated Disclosure System,* Release No. 33–6437 (Nov. 19, 1982) [47 FR 54764]. In 1994, the Commission expanded the eligibility requirement to delete references to debt or preferred securities and provide Form F–3 eligibility for other investment grade securities (such as foreign currency or other cash settled derivative securities). *See Simplification of Registration of Reporting Requirements for Foreign Companies,* Release No. 33–7053A (May 12, 1994) [59 FR 25810].

3 and Form F–3, other Commission forms and rules relating to securities offerings or issuer disclosures have included requirements that likewise rely on securities ratings.[26] Among them are Form F–9,[27] Forms S–4 and F–4,[28] and Exchange Act Schedule 14A.[29]

2. The 2011 Proposing Release

In February 2011, we proposed to revise the instructions to Form S–3 and Form F–3 so that they would no longer refer to security ratings by an NRSRO as a transaction requirement to permit issuers to register primary offerings of non-convertible securities for cash. Instead, we proposed that these forms would be available to register primary offerings of non-convertible securities if the issuer has issued (as of a date within 60 days prior to the filing of the registration statement) for cash at least $1 billion in non-convertible securities, other than common equity, in offerings registered under the Securities Act, over the prior three years. The proposals in the 2011 Proposing Release were substantially similar to amendments that were proposed in 2008.[30]

3. Comments Received on the 2011 Proposing Release

We received 48 comment letters on the 2011 Proposing Release.[31] We received nine comment letters from law firms, nine comment letters from associations or industry groups, 16 comment letters from utility companies, one comment letter from an institutional investor, two comment letters from banks or bank holding companies and 11 comment letters from other interested parties. The majority of the comments focused on the proposals to amend the eligibility criteria for Form S–3 and Form F–3.

All of the commentators suggested modifications to the proposals to amend Form S–3 and Form F–3. Several commentators believed that Congress did not intend to change the pool of issuers eligible to use Form S–3 and Form F–3.[32] Commentators generally did not believe that the Form S–3 and Form F–3 criteria needed to mirror the standard for issuers to qualify as WKSIs.[33] In particular, commentators noted that the proposed non-convertible securities (other than common equity) offering standard in the 2011 Proposing Release was disproportionately higher than the standard for primary offerings on Form S–3 and Form F–3 by issuers that have an aggregate market value of $75 million or more for their voting and non-voting common equity held by non-affiliates.[34] As a result, commentators raised concerns that the proposals would result in issuers who are currently eligible to use Form S–3 or Form F–3 losing that eligibility.[35]

In the 2011 Proposing Release, we requested comment on whether we should adopt rules that would keep the pool of issuers currently eligible to use Form S–3 and Form F–3 substantially the same. Commentators suggested several alternatives to the proposals in the 2011 Proposing Release that may preserve Form S–3 and Form F–3 eligibility for certain issuers. The commentators generally believed that the alternatives suggested would reserve the use of Form S–3 and Form F–3 for issuers that were widely followed in the marketplace. Some of the alternatives suggested by commentators include:

- Allowing either wholly or majority-owned subsidiaries of WKSIs to use Form S–3 or Form F–3;[36]
- Basing the eligibility standard on having $1 billion of non-convertible securities other than common equity outstanding;[37]
- Lowering the $1 billion threshold (commentators suggested various thresholds with some as low as $250 million);[38]
- Extending the measurement period for the $1 billion threshold to five years from three years;[39]
- Allowing securities issued in unregistered offerings of non-convertible securities other than common equity to be included in the calculation of the $1 billion threshold;[40]
- Allowing non-convertible securities other than common equity issued in registered exchange offerings to be included in the $1 billion calculation;[41]
- Allowing U.S. dollar denominated non-convertible securities other than common equity issued in Regulation S offerings to be included in the $1 billion calculation;[42]
- Adding an exception to allow regulated operating subsidiaries of utility companies to continue to use Form S–3 and Form F–3;[43]
- Adding an exception that would allow insurance company issuers of

[26] This release addresses rules and forms filed by issuers, disclosures made by issuers and relevant offering safe harbors under the Securities Act and Schedule 14A under the Exchange Act. In separate releases to be considered at a later date, the Commission intends to adopt rules to address other rules and forms that rely on an investment grade ratings component.

[27] *See* General Instruction I. of Form F–9.

[28] *See* General Instruction B.1 of Form S–4 and General Instruction B.1(a) of Form F–4.

[29] *See* Note E and Item 13 of Schedule 14A.

[30] *See* note 16 above.

[31] The public comments we received on the 2011 Proposing Release are available on our Web site at *http://www.sec.gov/comments/s7-18-08/s71808.shtml.* In addition, to facilitate public input on the Dodd-Frank Act, we provided a series of e-mail links, organized by topic, on our Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml.* The public comments we received on Section 939A of the Dodd-Frank Act are available on our Web site at *http://www.sec.gov/comments/df-title-ix/credit-rating-agencies/credit-rating-agencies.shtml.*

[32] *See* letters from Securities Industry and Financial Markets Association dated March 18, 1011 (SIFMA), SCANA Corporation dated March 28, 2011 (SCANA), Public Service Enterprise Group dated March 28, 2011 (PSEG), Davis Polk & Wardwell dated March 25, 2011 (Davis Polk), Exelon Corporation dated March 28, 2011 (Exelon), National Association of Real Estate Investment Trusts dated March 28, 2011 (NAREIT), The Financial Services Roundtable dated March 28, 2011 (Roundtable), Pepco Holdings, Inc. dated March 28, 2011 (Pepco), Edison Electric Institute dated March 28, 2011 (EEI) and Society of Corporate Secretaries & Governance Professionals dated April 1, 2011 (SCSGP).

[33] *See* letters from SIFMA, Debevoise & Plimpton LLP dated March 29, 2011 (Debevoise), Davis Polk, Cleary, Exelon, NAREIT, SCSGP, McGuire Woods LLP dated March 28, 2011 (McGuire Woods) and UnionBanCal Corporation dated March 28, 2011 (UnionBanCal).

[34] *See* letters from Davis Polk, Cleary, McGuire Woods, Debevoise, UnionBanCal, NAREIT, SCSGP and Exelon.

[35] *See* letters from Boeing Capital Corporation dated March 25, 2011 (BCC), EEI, Central Hudson Gas & Electric Corporation dated March 16, 2011 (Central Hudson), PSEG, DTE Energy Company dated March 28, 2011 (DTE), Alliant Energy Corporation dated March 28, 2011 (Alliant), PNM Resources, Inc. dated March 28, 2011 (PNM), The Laclede Group, Inc. dated March 29, 2011 (Laclede), Vectren Corporation dated April 5, 2011 (Vectren), Sutherland Asbill & Brennan LLP dated March 28, 2011 (Sutherland), Roundtable, NAREIT, SCSGP and American Council of Life Insurers dated May 11, 2011 (ACLI).

[36] *See* letters from BCC, Exelon, EEI, SCSGP, Southern, McGuire Woods, Dominion, Alliant, Laclede, Debevoise, Madison Gas and Electric Company dated March 29, 2011 (MGE), UnionBanCal and Vectren.

[37] *See* letters from SIFMA, BCC, Cleary, AEP, SCANA, Oglethorpe, PSEG, EEI, DTE, UnionBanCal and ACLI. The letter from Debevoise indicates that they would support a debt outstanding test lower than $1 billion, but they did not specify a threshold. The letter from Sutherland supports using a non-convertible security (other than common equity) outstanding test with a $500 million threshold.

[38] *See* letters from Davis Polk, Cleary Gottlieb Steen & Hamilton LLP dated March 28, 2011 (Cleary), McGuire Woods, Debevoise, UnionBanCal, NAREIT, SCSGP and Sutherland.

[39] *See* letters from Cleary, McGuire Woods, Dominion, PSEG and EEI.

[40] *See* letters from Central Hudson, SIFMA, Davis Polk, Exelon, NAREIT, McGuire Woods, Oglethorpe, PSEG, Debevoise, UnionBanCal and SCSGP.

[41] *See* letters from SIFMA, Exelon, McGuire Woods, Oglethorpe, PSEG, Debevoise and SCSGP.

[42] *See* letter from Davis Polk.

[43] *See* letters from Central Hudson, Entergy Corporation dated March 21, 2011 (Entergy), American Electric Power dated March 28, 2011 (AEP), SCANA, Pepco, Roundtable, The Southern Company dated March 28, 2011 (Southern), Dominion Resources, Inc. dated March 28, 2011 (Dominion), Wisconsin Energy Corporation dated March 28, 2011 (Wisconsin Energy), Alliant, DTE, EEI, Laclede, American Gas Association dated March 28, 2011 (AGA) and Vectren.

certain insurance contracts to continue to use Form S–3 and Form F–3;[44] and

• Adding an exception that would allow operating partnership subsidiaries of REITs to continue to use Form S–3 and Form F–3.[45]

Several commentators did not believe that the new eligibility criteria for Form S–3 and Form F–3 for primary offerings of non-convertible securities, other than common equity, should be based on the WKSI standard because it is disproportional to the criteria in Form S–3 and Form F–3 for primary offerings made in reliance on General Instruction I.B.1 of Form S–3 and Form F–3.[46] Commentators noted that the WKSI standard should be more stringent than the criteria for Form S–3 and Form F–3 eligibility because of the benefits, such as automatic shelf registration, that WKSI status confers.[47] Some commentators suggested that we should provide additional, alternative criteria for Form S–3 and Form F–3 eligibility.[48]

In addition, some commentators believed the three-year look back for the $1 billion threshold in the 2011 Proposing Release was arbitrary and could have significant consequences. One commentator believed that the volume standard could be ''volatile'' particularly in times of financial uncertainty.[49] One commentator did not believe its following in the marketplace would be affected by the timing of its debt issuances and would not be significantly affected if it did not issue $1 billion in three years.[50] One commentator did not believe Form S–3 and Form F–3 eligibility should be based on the frequency of debt issuances and believed issuers would be followed on the basis of their debt outstanding.[51] Several utility company commentators noted that debt issuances within their industry are done on an irregular basis in connection with large capital projects, which would make the three-year test difficult to satisfy on a consistent basis.[52]

Commentators generally believed that if issuers were unable to satisfy the proposed standard, they would seek to raise capital in the private markets instead of registering offerings on Form S–1.[53] Commentators believed that private offerings would be more efficient and take less time than a registered offering on Form S–1.[54] Commentators noted that using the private markets would make it difficult for issuers to ever gain eligibility for Form S–3 because the amount of non-convertible securities (other than common equity) issued in private offerings is not included in calculating the $1 billion threshold under the proposal.[55] Commentators also noted that if issuers were to use the private markets, it would be inconsistent with the Commission's policy preference for registered offerings.[56]

We have reviewed and considered all of the comments we received on the proposed amendments. The adopted amendments reflect changes made in response to many of these comments. These changes are discussed in more detail below.

4. Amendments

(i) Replace Investment Grade Rating Criterion With Alternative Criteria

(a) Overview

Today we are adopting amendments to revise the transaction eligibility criteria for registering primary offerings of non-convertible securities on Forms S–3 and F–3. After considering the comments we received on the 2011 Proposing Release, we believe that the amendments we are adopting today provide an appropriate and workable alternative to credit ratings for determining whether an issuer should be able to use Form S–3 and Form F–3 and have access to the shelf offering process.

The instructions to Forms S–3 and F–3 will no longer refer to security ratings by an NRSRO as a transaction requirement to permit issuers to register primary offerings of non-convertible securities for cash. Instead, these forms will be available to register primary offerings of non-convertible securities other than common equity if:

(i) The issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) The issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) The issuer is a wholly-owned subsidiary of a WKSI as defined in Rule 405 under the Securities Act; or

(iv) The issuer is a majority-owned operating partnership of a REIT that qualifies as a WKSI; or

(v) The issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to General Instruction I.B.2 of Form S–3 or Form F–3 in existence prior to the new rules, discloses the basis for such belief, and files the final prospectus for any such offering on or before the date that is three years from the effective date of the amendments.[57]

We are modifying eligibility criteria for use of Form S–3 and Form F–3 from the proposal because we are persuaded by commentators' arguments that the criteria from the 2011 Proposing Release could result in some issuers who should be eligible to use Form S–3 or Form F–3 because of their wide market following and who are currently eligible to no longer be eligible. As we noted in the 2011 Proposing Release, we are not aware of anything in the legislative history to indicate that Congress intended to substantially alter the pool of issuers eligible for short-form

[44] *See* letters from Sutherland, Roundtable, and ACLI. Issuers of certain insurance contracts (*e.g.,* contracts with so-called ''market value adjustment'' features and contracts that provide insurance benefits in connection with assets held in an investor's mutual fund, brokerage, or investment advisory account) are currently eligible to use Form S–3 and Form F–3 under General Instruction I.B.2. if these contracts have investment grade ratings. Market value adjustment (''MVA'') features have historically been associated with annuity and life insurance contracts that provide a specified rate of return to purchasers. In order to protect the insurer against the risk that a purchaser may take withdrawals from the contract at a time when the market value of the insurer's assets that support the contract has declined due to rising interest rates, insurers sometime impose an MVA upon surrender. Under an MVA feature, the insurer adjusts the proceeds a purchaser receives upon early surrender to reflect changes in the market value of its portfolio securities supporting the contract.

[45] *See* letter from NAREIT.

[46] *See* letters from Davis Polk, Cleary, McGuire Woods, Debevoise, UnionBanCal and NAREIT.

[47] *Id.*

[48] *See* letters from SIFMA, BCC and Exelon.

[49] *See* letter from Orchard Street Partners LLC dated February 10, 2011 (Orchard Street).

[50] *See* letter from BCC.

[51] *See* letter from Exelon.

[52] *See* letters from Entergy, Exelon, Dominion, Wisconsin Energy, Alliant, Oglethorpe, DTE and EEI.

[53] *See* letters from NAREIT, Davis Polk, Central Hudson, Entergy, Exelon, Oglethorpe, PSEG, DTE, Laclede and AGA.

[54] *See* letters from Central Hudson, Entergy and Exelon.

[55] *See* letters from Central Hudson, SIFMA, Oglethorpe and DTE.

[56] *See* letters from Davis Polk, NAREIT and EEI.

[57] *See* revised General Instruction I.B.2. of Forms S–3 and F–3. We are also deleting the reference to General Instruction I.B.2 in Instruction 3 to the signature block of Forms S–3 and F–3. Instruction 3 to the signature block of Form S–3 and Form F–3 provides that a registrant may sign the registration statement even if a final credit rating has not been issued so long as the registrant states its reasonable belief that the rating will be issued by the time of sale. *See* Section II.B. below for a discussion of General Instruction I.B.5.

registration and access to the shelf registration process.[58] Accordingly, we believe that any alternative standard for Form S–3 and Form F–3 eligibility that does not refer to credit ratings should preserve the forms and access to the shelf registration process for issuers who have a wide following in the marketplace.[59] These modifications to the proposals should preserve short-form eligibility for widely followed issuers. In addition to adding a non-convertible securities issued criteria, as proposed, we are also adding other criteria intended to allow widely followed issuers access to Form S–3 and Form F–3 and the shelf registration process.[60] These criteria do not distinguish among issuers by the quality of their credit but instead focus on wide following in the marketplace. Those modifications are discussed in more detail below.

In the 2011 Proposing Release, we solicited comment specifically related to how the proposals would affect operating subsidiaries of utility companies, REITs and insurance company issuers of certain insurance contracts. Among other things, we asked whether we should adopt industry-specific provisions that would enable these companies to continue to file registration statements on Form S–3 and Form F–3. The revisions we have made to the proposals, including the addition of several alternative standards, would allow widely followed issuers to use Form S–3 and Form F–3, and we believe that most of the operating subsidiaries of utility companies, REITs and insurance company issuers of certain insurance contracts that may have been excluded under the proposals will be included under the amendments we are adopting today.[61]

(b) $1 Billion of Non-Convertible Securities (Other Than Common Equity) Issued or $750 Million of Non-Convertible Securities (Other Than Common Equity) Outstanding

We are adopting the $1 billion of non-convertible securities, other than common equity, issued over three years criterion as proposed because we believe it would be an appropriate indicator of whether an issuer is widely followed. In addition, we are persuaded by commentators' arguments that focusing solely on issuances over the past three years may inappropriately limit use of Form S–3 or Form F–3. We agree that considering outstanding securities issued in primary registered offerings would result in issuers for whom short form registration is appropriate being eligible to use Form S–3 or Form F–3. As a result, we are amending General Instruction I.B.2. of Form S–3 and Form F–3 to provide that, among other things and in addition to the $1 billion of non-convertible securities, other than common equity, issued over three years criterion, an issuer that has at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act outstanding (as measured from a date within 60 days prior to the filing of the registration statement) will be eligible to register on Form S–3 or Form F–3 if the issuer meets the other requirements (such as those in General Instruction I.A.) of the form. For the non-convertible securities (other than common equity) outstanding criteria, we chose a level of $750 million because we believe this threshold will allow currently eligible issuers to continue to use Form S–3 and Form F–3 while preserving the forms' use for widely followed issuers. As noted above, several commentators supported a lower threshold than $1 billion.[62] While most of those commentators supported a threshold ranging from $250 million to $500 million, we believe setting the threshold to $750 million of non-convertible securities (other than common equity) outstanding will encourage registered offerings and assist in maintaining the availability of Form S–3 and Form F–3 for currently eligible issuers while also preserving Form S–3 and Form F–3 for widely followed issuers. This alternative will allow companies that have irregular issuances of non-convertible securities (other than common equity), but that still have significant amounts of non-convertible securities (other than common equity) issued in primary, registered offerings outstanding, to continue to have access to short-form registration and the shelf offering process. Similarly, by also adopting the $1 billion issued over three years threshold, we believe issuers who may issue a significant amount of non-convertible securities over a three-year period but then retire a portion of those securities based on prevailing market conditions will be able to continue to be eligible to use Form S–3 and Form F–3.

Consistent with the 2011 Proposing Release, the revised thresholds should be calculated consistent with the standards used to determine WKSI status. As a result, in determining compliance with both the $1 billion issued and the $750 million outstanding thresholds:

- Issuers can aggregate the amount of non-convertible securities, other than common equity, issued in registered primary offerings that were issued within the previous three years (measured as of a date within 60 days prior to the filing of the registration statement) or, for the non-convertible securities (other than common equity) outstanding threshold, that are outstanding as of a date within 60 days prior to the filing of the registration statement;
- Issuers can include only such non-convertible securities, other than common equity, that were issued in registered primary offerings for cash and not registered exchange offers;[63] and
- Parent company issuers only can include in their calculation the principal amount of their full and unconditional guarantees, within the meaning of Rule 3–10 of Regulation S–X,[64] of non-convertible securities, other than common equity, of their majority-owned subsidiaries issued in registered primary offerings for cash over the prior three years or, for the non-convertible securities (other than common equity) outstanding threshold, that are outstanding as of a date within 60 days prior to the filing of the registration statement.

In response to public comment, we have added an instruction to Form S–3 and Form F–3 clarifying how insurance company issuers should calculate the $1 billion issued and $750 million outstanding thresholds. Insurance company issuers, when registering offerings of insurance contracts,[65] will be permitted to include in their calculation the amount of insurance contracts, including variable insurance contracts, issued in offerings registered under the Securities Act over the prior

[58] *See* 2011 Proposing Release, *supra,* note 15, at note 20.

[59] *See Securities Offering Reform,* Release No. 33–8591 (Aug. 3, 2005) [70 FR 44722], where we said that we believed issuers with a wide following would produce ''Exchange Act reports that not only are reliable but also are broadly scrutinized by investors and the markets.''

[60] We note that none of these criteria are a standard of credit worthiness.

[61] *See* Section II.A.4.ii below for a discussion of the impact of the amendments.

[62] *See* note 38 above. The commentators included law firms and industry groups.

[63] Issuers will not be permitted to include the principal amount of securities that were offered in registered exchange offers by the issuer when determining compliance with the eligibility thresholds. A substantial portion of these offerings involve registered exchange offers of substantially identical securities for securities that were sold in private offerings.

[64] 17 CFR 210.3–10.

[65] For this purpose, an ''insurance contract'' is a security that is subject to regulation under the insurance laws of any State or Territory of the United States or the District of Columbia.

three years, or for the non-convertible securities (other than common equity) outstanding threshold, that are outstanding as of a date within 60 days prior to the filing of the registration statement.[66] We believe that insurance company issuers that have a significant amount of registered contracts issued or outstanding receive sufficient scrutiny by the marketplace that short-form registration is appropriate for insurance contracts of those issuers. We also believe that calculating the eligibility thresholds in this manner will enable insurance company issuers that are currently eligible to use Form S–3 and Form F–3 to register insurance contract offerings, and that are unable to rely on the alternative eligibility criteria, to remain eligible to use those forms.

In calculating the $1 billion or the $750 million amount, as applicable, issuers generally will be permitted to include the principal amount of any debt and the greater of liquidation preference or par value of any non-convertible preferred stock that were issued in primary registered offerings for cash.[67] In calculating the $1 billion amount or the $750 million amount, as applicable, an insurance company, when using Form S–3 or Form F–3 to register insurance contracts, may include the purchase payments or premium payments for insurance contracts issued in offerings registered under the Securities Act over the prior three years, or for the non-convertible securities (other than common equity) outstanding threshold, the contract value as of the measurement date, of any outstanding insurance contracts issued in offerings registered under the Securities Act.[68]

Several commentators asserted that we should allow issuers to include securities issued in unregistered transactions to be included in the eligibility threshold.[69] In addition, some commentators wanted us to permit the inclusion of registered exchange offers in the calculations,[70] and one commentator believed that U.S. dollar denominated securities issued in Regulation S offerings should be permitted to be included in the calculations.[71] These commentators generally believed that securities issued in these transactions play a role in whether an issuer is widely followed.[72] After considering the comments, we have decided not to allow securities issued in unregistered offerings, registered exchange offerings or Regulation S offerings to be included in the $1 billion or $750 million calculations. We are concerned that including such securities could result in the inclusion of some securities that are not indicative of wide market following, and thus do not benefit from the attendant scrutiny of the issuer's public filings by a broad section of market participants, such as privately negotiated placements to a small number of investors. We are also concerned that delineating when a private offering would, and would not, be included would be unworkable. Further, as noted above, the Commission has previously indicated a policy preference for registered offerings.[73] We believe that it would be inconsistent with that preference to allow securities issued in transactions not registered under the Securities Act to be included in the calculation of the $1 billion or $750 million thresholds. In addition, the calculation of the $1 billion and the $750 million standards are substantially similar to the calculation for WKSI status in which unregistered and registered exchange offerings are not permitted to be included.

(c) Subsidiaries of WKSIs

Under the amendments as adopted, issuers that are wholly-owned subsidiaries of WKSIs will be eligible to use Form S–3 or Form F–3 for offerings of non-convertible securities other than common equity. Commentators noted that a wholly-owned subsidiary of a WKSI is likely to be followed by analysts who follow the WKSI as a part of the WKSI's operations, which supports allowing these companies access to Form S–3 and Form F–3. We also believe this will allow many utility company operating subsidiaries and insurance company issuers of certain insurance contracts to continue to be able to use Form S–3 and Form F–3, which would reduce the negative impact the proposals in the 2011 Proposing Release potentially could have had on these issuers' ability to raise capital and to offer securities.

Some commentators urged us to permit less than wholly-owned subsidiaries of WKSIs to have access to Form S–3 and Form F–3 under a new eligibility criteria for subsidiaries of WKSIs.[74] Except with respect to certain REIT structures discussed below, we have limited this eligibility to wholly-owned subsidiaries of WKSIs because we believe that a wholly-owned subsidiary is more likely to be followed by analysts in connection with its WKSI parent. Also, we note that the limitation does not appear to significantly impact the eligibility of WKSI subsidiaries currently eligible to use Form S–3 and Form F–3.

Although the new criteria for subsidiaries of WKSIs will generally be limited to wholly-owned subsidiaries, we are adopting a provision that will allow certain operating partnerships of REITs to continue to use Form S–3 and Form F–3. Given the partnership structure, REITs generally do not wholly own the operating partnerships; however, the REIT controls the operating partnership because it is the general partner. Further, the REIT generally conducts all of its business through the operating partnership and holds its properties in the operating partnership. As a result of this structure, one commentator representing the REIT industry explained that followers of the REIT parent analyze the operations of the operating partnerships in conjunction with following the REIT.[75] We are adopting a provision that will allow a majority-owned operating partnership subsidiary of a REIT to register offerings of non-convertible securities, other than common equity, on Form S–3 or Form F–3 so long as the REIT parent is a WKSI. In the limited context of REITs with operating partnerships, we believe permitting the use of Form S–3 and Form F–3 by majority-owned operating partnerships whose REIT parent is a WKSI is consistent with our goal of seeking to assure that entities using those forms are widely followed.

(d) Grandfathering of Other Currently Eligible Issuers

Finally, commentators expressed wide support for a temporary

[66] One commenter asked that we clarify that an insurance company be permitted to include variable insurance contracts in calculating whether the insurance company meets the eligibility threshold. *See* letter from Sutherland.

[67] In determining the dollar amount of securities that have been registered during the preceding three years, issuers will use the same calculation that they use to determine the dollar amount of securities they are registering for purposes of determining fees under Rule 457 [17 CFR 230.457].

[68] For variable insurance contracts, the amount of purchase payments or premium payments used in this calculation may not include amounts initially allocated to investment options that are not registered under the Securities Act, and the contract value may not include amounts allocated as of the measurement date to investment options that are not registered under the Securities Act.

[69] *See* letters from Central Hudson, SIFMA, Davis Polk, Exelon, NAREIT, McGuire Woods, Oglethorpe, PSEG, Debevoise, UnionBanCal and SCSGP.

[70] *See* letters from SIFMA, Exelon, McGuire Woods, Oglethorpe, PSEG, Debevoise and SCSGP.

[71] *See* letter from Davis Polk.

[72] *See, e.g.,* letter from SIFMA.

[73] *See* note 56 and related text. *See also Securities Offering Reform* in note 59 above.

[74] *See* note 36 above and related text.

[75] *See* letter from NAREIT.

''grandfather'' provision that would allow issuers that are currently eligible to use Form S–3 and Form F–3 to continue to use those forms for a period of time even if the issuers would not be eligible under the new rules.[76] As noted above, we are not aware of anything in the legislative history to indicate that Congress intended for Section 939A of the Dodd-Frank Act to substantially alter access to our short forms or the shelf registration process. Although we believe that the revisions to the proposal described above would not result in significant numbers of issuers losing access to those forms, we are nevertheless concerned that there could be some issuers that would no longer be eligible to use Form S–3 or Form F–3. In order to ease transition to the new rules and allow companies affected by the amendments time to adjust, we are adopting a temporary ''grandfather'' clause that will allow issuers who reasonably believe they would have been eligible to rely on General Instruction I.B.2. of Form S–3 or Form F–3 based on the criteria in existence prior to the new rules and who disclose that belief and the basis for it in the registration statement, to be able to use Form S–3 and Form F–3 if they file a final prospectus for an offering on Form S–3 or Form F–3 within three years from the effective date of the new rules.[77] We are adopting a ''reasonable belief'' standard because of the way in which some credit ratings work. Because some issuers would likely not obtain a credit rating until a deal is relatively certain (unless the issuer has an issuer rating), those issuers would not have a bright-line way of determining whether they were eligible to use Form S–3 and Form F–3 based on the criteria in effect prior to the new rules. We believe requiring the issuer to disclose its reasonable belief will prompt issuers to consider carefully whether the disclosure is accurate since they will be responsible for the disclosure under the Securities Act. As a result, as long as the issuer has a reasonable belief that it would have been eligible and discloses that belief (and the basis for it) in the registration statement, the issuer will be able use Form S–3 and Form F–3 for a period of three years from the effective date of the new rules. We believe three years will provide issuers with enough time to adjust to the new rules, including modifying how they might choose to offer securities. Factors that indicate a reasonable belief of eligibility would include, but not be limited to:

- An investment grade issuer credit rating;
- A previous investment grade credit rating on a security issued in an offering similar to the type the issuer seeks to register that has not been downgraded or put on a watch-list since its issuance; or
- A previous assignment of a preliminary investment grade rating.

(ii) Impact of Amendments

We noted in the 2011 Proposing Release that we anticipated that under the proposed threshold, which was intended to capture widely followed issuers based on the amount of recently issued non-convertible securities other than common equity, some high yield debt issuers and issuers without credit ratings that are not currently eligible to use Form S–3 would become eligible and some issuers currently eligible to use Form S–3 and Form F–3 would become ineligible. We believe the changes we have made to the proposals, which include also considering the amount of outstanding non-convertible securities other than common equity, will reduce the likelihood of unnecessarily excluding issuers that are currently eligible to use Form S–3 and Form F–3. In the proposing release, based on a review of non-convertible securities, other than common equity, issued in the United States from January 1, 2006 through August 15, 2008, we estimated that approximately 45 issuers who were previously eligible to use Form S–3 (and who had made an offering during the review period) would no longer be able to use Form S–3 for offerings of non-convertible securities other than common equity securities.[78] We further estimated in the 2011 Proposing Release that approximately eight issuers who were previously ineligible to use Form S–3 or Form F–3 would be eligible to use those forms if the proposals were adopted. In connection with the changes to the proposals that we are adopting today, we reviewed the 45 companies we believed would become ineligible to use Form S–3 or Form F–3 under the proposals to determine how many companies would remain eligible to use Form S–3 and Form F–3. Based on our review, we estimate that of the 45 companies we previously estimated would be excluded under the proposal, 39 would remain eligible because they are wholly-owned subsidiaries of WKSIs and two would remain eligible because they have at least $750 million in non-convertible securities (other than common equity) outstanding. Thus, from the sample of 45 companies that would have lost their eligibility based on the standards in the proposing release, four companies would remain ineligible to use Form S–3 or Form F–3 with the changes we are making in this adopting release. Based on the review of offerings described above, we estimate that 16 issuers who have recently used Form S–1 will become newly eligible to use Form S–3 and Form F–3. The number of issuers who may become newly eligible to use Form S–3 or Form F–3 includes insurance company issuers of certain insurance contracts, a number of whom now file on Form S–1 but that will become eligible to use Form S–3 as a result of the changes made to the eligibility requirements being adopted.[79] As a result, we believe that the amendments will result in a net increase of 12 additional issuers becoming eligible to use Form S–3 and Form F–3.

Some commentators believed that our estimates in the proposing release understated the number of companies that would be affected by the proposals.[80] Another commentator reviewed data from March 2008 to March 2011 in the utility industry and believes that at least 60 utility companies would have been affected.[81] We acknowledged in the 2011 Proposing Release that reviewing offerings during a different time period would give different results. We also acknowledged that our data did not capture issuers who were eligible to use Form S–3 and Form F–3 but did not make offerings during the review period. However, we believe that the changes we are making to the proposals will reduce the impact on certain issuers, particularly utility companies, REITs and insurance company issuers of certain insurance contracts. We believe the provision to allow wholly-owned subsidiaries of WKSIs (or, in the case of REITs, majority owned operating partnerships of WKSIs) to continue to have access to Form S–3 and Form F–3 and the other changes we are making will allow these types of issuers continued access to short form registration and the shelf offering process. Because we do not believe

[76] *See* letters from SIFMA, Entergy, Davis Polk, Cleary, AEP, Roundtable, Wisconsin Energy, Oglethorpe, DTE, MGE and Vectren.

[77] Under this eligibility standard, issuers will be able to file new Forms S–3 or F–3, but any offerings would need to have a final prospectus filed within three years of the effective date of the new rules.

[78] *See* the 2011 Proposing Release at note 58 and related text.

[79] *See* note 44 above.

[80] *See* letters from SIFMA, Entergy and EEI.

[81] *See* letter from SIFMA. *See also* letter from Entergy, who argued that the potential number of utility companies affected may have been understated because utility companies did not make offerings due to market conditions.

Congress intended to substantially alter the companies eligible to use Form S–3 and Form F–3, we are adopting a standard that we believe balances the goals of preserving Form S–3 and Form F–3 eligibility for current users while reserving the forms for issuers that are widely followed in the marketplace.

B. Technical Amendment to General Instruction I.B.5. of Form S–3

General Instruction I.B.5. to Form S–3 provides transaction requirements for offerings of investment grade asset-backed securities. That instruction contains a cross-reference to the definition of ''investment grade securities'' that currently is found in General Instruction I.B.2. of Form S–3. As one commentator noted, the amendments we are adopting today would remove the definition of investment grade securities from General Instruction I.B.2.[82] In April 2010, we proposed to remove references to credit ratings as a requirement for shelf eligibility for offerings of asset-backed securities.[83] Among other things, the proposal would have required risk retention by the sponsor as a condition to shelf eligibility. Those proposals are still outstanding. As a result, such issuers still look to General Instruction I.B.5. for their offerings. Therefore, we are adopting an amendment to General Instruction I.B.5. of Form S–3 to move the definition of investment grade securities to that instruction until such time as new shelf eligibility requirements for asset-backed issuers are adopted that do not reference credit ratings.

C. Rescission of Form F–9

Form F–9 allows certain Canadian issuers [84] to register investment grade debt or investment grade preferred securities that are offered for cash or in connection with an exchange offer, and which are either non-convertible or not convertible for a period of at least one year from the date of issuance.[85] Under the form's requirements, a security is rated ''investment grade'' if it has been rated investment grade by at least one NRSRO, or at least one Approved Rating Organization, as defined in National Policy Statement No. 45 of the Canadian Securities Administrators (''CSA'').[86] This eligibility requirement was adopted as part of a 1993 revision to the MJDS originally adopted by the Commission in 1991 in coordination with the CSA.[87]

Under Form F–9, an eligible issuer has been able to register investment grade securities using audited financial statements prepared pursuant to Canadian generally accepted accounting principles (''Canadian GAAP'') without having to include a U.S. GAAP reconciliation. In contrast, a MJDS filer must reconcile its home jurisdiction financial statements to U.S. GAAP when registering securities on a Form F–10.[88] However, the CSA has adopted rules that will require Canadian reporting companies to prepare their financial statements pursuant to International Financial Reporting Standards as issued by the International Accounting Standards Board (''IFRS'') beginning in 2011.[89] Foreign private issuers that prepare their financial statements in accordance with IFRS are not required to prepare a U.S. GAAP reconciliation.[90] Since a Canadian issuer will not have to perform a U.S. GAAP reconciliation under IFRS, one of the primary differences between Form F–9 and Form F–10 will be eliminated. Once the Canadian IFRS-related amendments become effective,[91] the disclosure requirements for an investment grade securities offering registered on Form F–10 will be the same as the disclosure requirements for one registered on Form F–9.

In the 2011 Proposing Release, we proposed to rescind Form F–9 due to the Canadian regulatory developments described above. One commentator noted that Canadian issuers who have a later fiscal year end will have a later effective date for required IFRS financial statements.[92] If Form F–9 were to be rescinded before an issuer is required to prepare IFRS financial statements, then that issuer would be required to provide a reconciliation to U.S. GAAP in connection with the filing of a registration statement during the interim period before its IFRS financial statements are available. In order to address this concern and ease transition for these issuers, we are adopting a delayed effective date of December 31, 2012 for the rescission of Form F–9.

Commentators also noted that a gap remains between the eligibility requirements for Form F–9 and Form F–10.[93] Currently, issuers using Form F–9 are not required to have a public float while issuers using Form F–10 must either have a $75 million public float or be debt issuers with a guarantee from a parent meeting the requirements of Form F–10. As a result, to the extent a Form F–9 issuer does not have the requisite public float and does not have a parent guarantee of its debt, it would not be eligible to use Form F–10.

As we noted in the 2011 Proposing Release, MJDS issuers have infrequently used Form F–9. Of the 40 Form F–9s filed by 22 issuers since January 1, 2007, we believe only one of these issuers would not qualify to file on Form F–10 if Form F–9 is rescinded. Consistent with the temporary ''grandfather'' provision we are adopting for Form S–3 and Form F–3 filers, in order to address this concern and ease the transition, we are adopting a temporary ''grandfather'' provision in Form F–10 that would permit any issuer that discloses in the registration statement that it has a reasonable belief that it would have been eligible to file on Form F–9 as of the effective date of the amendments, and discloses the basis for that belief, to file a final prospectus for an offering on Form F–10 for a period of three years from the effective date of the new rules even if it does not satisfy

[82] *See* letter from American Securitization Forum dated March 28, 2011 (ASF).

[83] *See Asset-Backed Securities,* Release No. 33–9117 (Apr. 7, 2010) [75 FR 23328]. In 2010, we proposed amendments that would remove General Instruction I.B.5. of Form S–3 and move shelf offerings of asset-backed securities to a new form.

[84] Form F–9 is the Multijurisdictional Disclosure System (''MJDS'') form used to register investment grade debt or preferred securities under the Securities Act by eligible Canadian issuers.

[85] Securities convertible after a period of at least one year may only be convertible into a security of another class of the issuer.

[86] *See* General Instruction I.A. to Form F–9.

[87] *See Amendments to the Multijurisdictional Disclosure System for Canadian Issuers,* Release No. 33–7025 (Nov. 3, 1993) [58 FR 62028]. *See also Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers,* Release No. 33–6902 (June 21, 1991) [56 FR 30036].

[88] *See* Item 2 under Part I of Form F–10 [17 CFR 239.40]. Form F–10 is the general MJDS registration statement that may be used to register securities for a variety of offerings, including primary offerings of equity and debt securities, secondary offerings, and exchange offers pursuant to mergers, statutory amalgamations, and business combinations.

[89] See, for example, CSA IFRS-Related Amendments to Securities Rules and Policies (2010), which are available at: *http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20101001_52–107_ifrs-amd-3339-supp3.pdf.* Canadian reporting companies that are U.S. registrants may elect to prepare their financial statements in accordance with U.S. GAAP. *See* Part 3.7 of National Instrument 52–107.

[90] *See* Item 17(c) of Form 20–F.

[91] Canadian reporting issuers and registrants with financial years beginning on or after January 1, 2011, will be required to comply with the new IFRS requirements. For companies with a year-end of December 31, 2011, the initial reporting period under IFRS will be the first quarter ending March 31, 2011. See the ''Transition to International Financial Reporting Standards'' of the Ontario Securities Commission (''OSC''), which is available at: *http://www.osc.gov.on.ca/en/ifrs_index.htm?wloc=141RHEN&id=21789EN.*

[92] *See* letter from Bank of Nova Scotia dated March 28, 2011 (Scotiabank).

[93] *See* letters from Davies Ward Phillips & Vineberg LLP dated March 28, 2011 (Davies), Osler, Hoskin & Harcourt LLP dated March 28, 2011 (Osler) and Fraser Milner Casgrain LLP dated March 28, 2011 (FMC).

the parent guarantee or public float requirements of Form F–10.[94]

One commentator also noted that removing the reference to Form F–9 from Form 40–F (as was proposed in the 2011 Proposing Release) would result in former F–9 filers who do not have a public float of $75 million or a parent guarantee of their debt losing eligibility to file annual reports on Form 40–F.[95] Issuers who are not eligible to use Form 40–F use Form 20–F, which requires disclosure in accordance with standards set by the Commission rather than standards set by the Canadian securities regulators. In Form 40–F, Canadian MJDS filers file with the Commission their home jurisdiction periodic disclosure documents under cover of Form 40–F. In Form 20–F, foreign private issuers are subject to the Commission's special disclosure requirements for foreign private issuers, and have to prepare separate disclosure to comply with those requirements. Similar to the Form F–10 ''grandfather'' provision above, we believe this change to Form 40–F would result in a very small number of issuers no longer being able to use Form 40–F. In order to address this concern, we are adopting a permanent ''grandfather'' provision that would allow currently eligible Form 40–F filers to continue to use Form 40–F to satisfy their reporting obligations under Section 13 and Section 15(d) of the Exchange Act as to previously sold securities if they had filed and sold securities under a Form F–9 with the Commission before the effective date of the new rules. We believe a permanent ''grandfather'' provision is appropriate for these issuers because some issuers may have issued securities many years ago and may still be reporting pursuant to the requirements of Form 40–F, and given the design of the MJDS system, we do not believe it would be appropriate to change the requirements that these issuers relied on when the offering was made.

One commentator was opposed to rescinding Form F–9 because Form F–9 filers who are in the oil and gas industry are not required to provide the disclosure required by Accounting Standards Codification 932 ''Extractive Activities—Oil and Gas'' (ASC 932) that would be required for Form F–10 filers.[96] A review of issuers that have filed a Form F–9 since January 1, 2007 indicates that this change would affect very few issuers. As the commentator notes, the Commission has indicated that it will continue to monitor the necessity of providing ASC 932 disclosure as regulatory changes occur.[97] At this time we are not making any changes to the requirement for Form F–10 filers to provide ASC 932 disclosure or otherwise making special accommodations for previous Form F–9 filers. We are also not adopting a grandfather provision for this disclosure requirement because we believe the burden on former F–9 filers will not be significant and will impact a very small number of issuers.

D. Ratings Reliance in Other Forms and Rules

1. Forms S–4 and F–4 and Schedule 14A

Proposals relating to Form S–4, Form F–4 and Schedule 14A were also included in the 2011 Proposing Release. We did not receive significant separate comment on these proposals. Form S–4 and Form F–4 include the Form S–3 and Form F–3 eligibility criteria by allowing registrants that meet the registrant eligibility requirements of Form S–3 or F–3 and that are offering investment grade securities to incorporate by reference certain information.[98] Similarly, Schedule 14A permits a registrant to incorporate by reference if the Form S–3 registrant requirements in General Instruction I.A. are met and action is to be taken as described in Items 11, 12 and 14[99] of Schedule 14A, which concerns non-convertible debt or preferred securities that are ''investment grade securities'' as defined in General Instruction I.B.2. of Form S–3.[100] In addition, Item 13 of Schedule 14A allows financial information to be incorporated into a proxy statement if the requirements of Form S–3 (as described in Note E to Schedule 14A) are met. Because we are changing the eligibility requirements in Forms S–3 and F–3 to remove references to ratings by an NRSRO, we believe the same standard should apply to the disclosure options in Forms S–4 and F–4 based on Form S–3 or F–3 eligibility. That is, a registrant will be eligible to use incorporation by reference in order to satisfy certain disclosure requirements of Forms S–4 and F–4 to register non-convertible debt or preferred securities on Form S–4 or Form F–4 if:

(i) The issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) The issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act;

(iii) The issuer is a wholly-owned subsidiary of a WKSI as defined in Rule 405 under the Securities Act;

(iv) The issuer is a majority-owned operating partnership of a REIT that qualifies as a WKSI; or

(v) The issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to General Instruction I.B.2 of Form S–3 or Form F–3 in existence prior to the new rules, discloses the basis for such belief, and files the final prospectus for any such offering on or before the date that is three years from the effective date of the amendments.

Similarly, we are amending Schedule 14A to refer simply to the requirements of General Instruction I.B.2. of Form S–3, rather than to ''investment grade securities.'' As a result, an issuer will be permitted to incorporate by reference into a proxy statement if the issuer satisfied the requirements of General Instruction I.A. of Form S–3, the matter to be acted upon related to non-convertible securities, other than common equity, and was described in Item 11, 12 or 14 of Schedule 14A and the issuer falls into one of the categories listed above (measured as of a date that is within 60 days of the proxy first being sent to security holders).

2. Securities Act Rules 138, 139 and 168

Other Securities Act rules also reference credit ratings. Rules 138, 139, and 168 under the Securities Act provide that certain communications are deemed not to be an offer for sale or offer to sell a security within the

[94] Similar to the grandfather provision we are adopting for Form S–3 and Form F–3 filers, new Form F–10s may be filed, but issuers relying on this instruction will need to file a final prospectus for any such offering within three years of the effective date of the new rules.

[95] *See* letter from Davies.

[96] *See* letter from Paul, Weiss, Rifkind, Wharton & Garrison LLP dated March 28, 2011 (Paul Weiss).

[97] *See* Release No. 33–8879, *Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP* (Dec. 21, 2007) [73 FR 986].

[98] *See* General Instruction B.1 of Forms S–4 and Form F–4.

[99] Item 11 of Schedule of 14A provides for solicitations related to the authorization or issuance of securities other than an exchange of securities. Item 12 provides for solicitations related to the modification or exchange of securities. Item 14 provides for solicitations related to mergers, consolidations and acquisitions.

[100] *See* Note E of Schedule 14A.

meaning of Sections 2(a)(10)[101] and 5(c)[102] of the Securities Act when the communications relate to an offering of non-convertible investment grade securities. Under current rules, these communications include the following:

- Under Securities Act Rule 138, a broker's or dealer's publication about securities of a foreign private issuer that meets F–3 eligibility requirements (other than the reporting history requirements) and is issuing non-convertible investment grade securities;
- Under Securities Act Rule 139, a broker's or dealer's publication or distribution of a research report about an issuer or its securities where the issuer meets Form S–3 or F–3 registrant requirements and is or will be offering investment grade securities pursuant to General Instruction I.B.2. of Form S–3 or F–3, or where the issuer meets Form F–3 eligibility requirements (other than the reporting history requirements) and is issuing non-convertible investment grade securities; and
- Under Securities Act Rule 168, the regular release and dissemination by or on behalf of an issuer of communications containing factual business information or forward-looking information where the issuer meets Form F–3 eligibility requirements (other than the reporting history requirements) and is issuing non-convertible investment grade securities.

In the 2011 Proposing Release, we proposed to revise these rules to refer to the new proposed instructions in General Instruction I.B.2 of Form S–3 or Form F–3, as appropriate. We received little comment on these proposals. One commentator did not believe amendments to these rules were required by the Dodd-Frank Act.[103] The commentator was concerned that the amendments would be burdensome on firms that publish research because they would have to determine the issuer's form eligibility each time they wanted to publish research instead of relying on a published credit rating.[104]

We do not believe that determining an issuer's form eligibility will be unduly burdensome for those seeking to publish research. A review of the issuer's or its parent company's publicly available filings, such as Forms 10–K or prospectuses, should indicate whether the issuer satisfies the eligibility requirements for Form S–3 or Form F–3.[105] We also believe that these revisions are appropriate both because of the Dodd-Frank Act's goal to reduce reliance on credit ratings and to promote regulatory consistency. As a result, we are adopting revisions to Rules 138, 139, and 168 to be consistent with the revisions we are adopting to the eligibility requirements in Forms S–3 and F–3.

3. Rule 134(a)(17)

Securities Act Rule 134(a)(17)[106] permits the disclosure of security ratings issued or expected to be issued by NRSROs in certain communications deemed not to be a prospectus or free writing prospectus. We proposed in the 2011 Proposing Release to remove this rule since we believe providing a safe harbor that explicitly permits the presence of a credit rating assigned by an NRSRO is not consistent with the purposes of Section 939A.

Commentators were opposed to this proposal.[107] Two commentators argued that removing Rule 134(a)(17) is not required by Section 939A of Dodd-Frank.[108] One commentator did not believe that allowing the inclusion of credit rating information encourages reliance on ratings but instead merely reflects the fact that ratings are relevant to investors.[109] Another commentator believed we should expand the rule to cover all credit ratings instead of those issued by NRSROs.[110] That commentator believed removing Rule 134(a)(17) would result in less information being available to investors. One commentator believed the amendment is not required by either the letter or spirit of Section 939A and would chill information available to investors.[111]

Notwithstanding the comments we received, we believe it is appropriate to revise Rule 134 in order to remove the safe harbor for disclosure of credit ratings assigned by NRSROs. We believe providing a safe harbor that explicitly permits the presence of a credit rating assigned by an NRSRO is not consistent with the purposes of Section 939A to reduce reliance on credit ratings. We also do not believe this change will have a material impact on the information available to investors because issuers will (as is common now) be able to disclose a credit rating in a free writing prospectus.[112] In addition, as we noted in the 2011 Proposing Release, removing the safe harbor for this type of information would not necessarily result in a communication that included this information being deemed to be a prospectus or a free writing prospectus. The revision results in there no longer being a safe harbor for a communication that included this information. Instead, the determination as to whether such information constitutes a prospectus would be made in light of all of the circumstances of the communication.

III. Paperwork Reduction Act

A. Background

Certain provisions of the rule amendments contain a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (PRA).[113] The Commission is submitting these amendments and rules to the Office of Management and Budget (OMB) for review in accordance with the PRA.[114] An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. The titles for the collections of information are:[115]

[101] 15 U.S.C. 77b(a)10.

[102] 15 U.S.C. 77e(c).

[103] *See* letter from SIFMA.

[104] *Id.*

[105] For example, for an issuer that is a subsidiary of a WKSI, the parent's Form 10–K would note its WKSI status. For the amount of non-convertible securities (other than common equity) outstanding or issued, the amounts in financial statements could be compared to prospectuses to determine that the securities were sold in registered offerings.

[106] 17 CFR 230.134(a)(17). These disclosures generally appear in ''tombstone'' ads or press releases announcing offerings. A communication is eligible for the safe harbor if the information included is limited to such matters as, among others, factual information about the identity and business address of the issuer, title of the security and amount being offered, the price or a bona fide estimate of the price or price range, the names of the underwriters participating in the offering and the name of the exchange where such securities are to be listed and the proposed ticker symbols.

[107] *See* letters from SIFMA, Davis Polk, Cleary, Roundtable, ASF and Debevoise.

[108] *See* letters from SIFMA and Davis Polk.

[109] *See* letter from SIFMA.

[110] *See* letter from Davis Polk. A proposal to expand Rule 134(a)(17) was included in the 2008 proposing Release. We received little comment on the proposal at that time. As we noted in the 2011 Proposing Release, we do not believe it is appropriate to expand the rule to cover all credit ratings issued because we do not believe it would be consistent with the otherwise limited disclosures covered by the Rule 134 safe harbor.

[111] *See* letter from Cleary. *See also* letters from Roundtable, ASF and Debevoise.

[112] One commentator pointed out that not all companies are eligible to use free writing prospectuses. *See* letter from SIFMA. The examples given by the commentator covered investment companies and business development companies. However, pursuant to Rule 134(g), those companies currently cannot rely on the safe harbor in Rule 134, so the amendment to Rule 134(a)(17) should not affect those companies. In addition, we note that the exclusion from the ability to use free writing prospectuses for ''ineligible issuers'' does not preclude such issuers (except for blank check companies, penny stock companies and shell companies) from using free writing prospectuses that are ''term sheets,'' which is a common way that issuers disclose the credit rating for a particular offering.

[113] 44 U.S.C. 3501 *et seq.*

[114] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[115] Although we are adopting amendments to Form S–4, Form F–4 and Schedule 14A, we do not

''Form S–1'' (OMB Control No. 3235–0065) ;

''Form S–3'' (OMB Control No. 3235–0073);

''Form F–1'' (OMB Control No. 3235–0258);

''Form F–3'' (OMB Control No. 3235–0256);

''Form F–9'' (OMB Control No. 3235–0377); and

''Form F–10'' (OMB Control No. 3235–0380).

We adopted all of the existing regulations and forms pursuant to the Securities Act or the Exchange Act. These regulations and forms set forth the disclosure requirements for registration statements and proxy statements that are prepared by issuers to provide investors with information. Our amendments to existing forms and regulations are intended to replace rule and form requirements of the Securities Act and the Exchange Act that rely on security ratings with alternative requirements.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collection of information. There is no mandatory retention period for the information disclosed, and the information disclosed would be made publicly available on the EDGAR filing system.

B. Summary of Collection of Information Requirements

The criteria we are adopting for issuers of non-convertible securities, other than common equity, who are otherwise ineligible to use Form S–3 or Form F–3 to conduct primary offerings because they do not meet the aggregate market value requirement is designed to capture those issuers with a wide market following.

Some commentators believed that our estimates in the 2011 Proposing Release understated the number of companies that would no longer be eligible under the proposals.[116] One commentator reviewed data from March 2008 to March 2011 in the utility industry and believed that at least 60 utility companies would no longer have been eligible to use Form S–3 or Form F–3 over that three year period.[117] One commentator believed the potential number of utility companies who would lose eligibility may have been understated because utility companies did not make offerings due to market conditions.[118] Another commentator believed that our PRA figures were ''way off'' because there are ''far more S–1, S–3, F–1 and F–3 filings'' than described in the release, although the commentator did not provide any additional data.[119] We believe the changes we have made to the proposals will reduce the number of currently eligible issuers that would no longer be eligible to use Form S–3 and Form F–3, particularly utility companies. Our revised PRA estimates reflect the expected impact.[120]

We expect that under the new criteria, the number of companies in a 12-month period eligible to register on Form S–3 or Form F–3 for primary offerings of non-convertible securities, other than common equity, for cash will increase by approximately four issuers for Form S–3 and one issuer for Form F–3.[121] We expect that the issuers filing on Form S–1 and F–1 will decrease by the same amounts.

In addition, because these amendments relate to eligibility requirements, rather than disclosure requirements, the Commission does not expect that the revisions adopted will impose any new material recordkeeping or information collection requirements. Issuers may be required to ascertain the aggregate principal amount of non-convertible securities, other than common equity, outstanding that were issued in registered primary offerings for cash, but the Commission believes that this information should be readily available and easily calculable.

We are also rescinding Form F–9, which is the form used by qualified Canadian issuers to register investment grade securities. Because of recent Canadian regulatory developments, we no longer believe that keeping Form F–9 as a distinct form would serve a useful purpose. In addition, Canadian issuers have infrequently used Form F–9. As a result of the rescission of Form F–9, we believe there would be an additional six filers on Form F–10.[122] We do not believe that the burden of preparing Form F–10 will change because the information required by Form F–10 is substantially the same as that required by Form F–9.

C. Paperwork Reduction Act Burden Estimates

For purposes of the Paperwork Reduction Act, we estimate that there will be no annual incremental increase in the paperwork burden for issuers to comply with our collection of information requirements. We do estimate, however, that the number of respondents on Forms S–3, F–3 and F–10 will increase as a result of the amendments. As a result, the aggregate burden hour and professional cost numbers will increase for those forms due to the additional number of respondents. We also expect that the number of respondents will decrease for Forms S–1 and F–1, which will reduce the aggregate burden hour and professional costs for those forms.[123] These estimates represent the average burden for all companies, both large and small. For each estimate, we calculate that a portion of the burden will be carried by the company internally, and the other portion will be carried by outside professionals retained by the company. The portion of the burden carried by the company internally is reflected in hours, while the portion of the burden carried by outside professionals retained by the company is reflected as a cost. We estimate these costs to be $400 per hour. A summary of the changes is included in the table below.

anticipate any changes to the reporting burden or cost burdens associated with these forms, or the number of respondents as a result of the proposed amendments.

[116] *See* letters from SIFMA, Entergy and EEI.

[117] *See* letter from SIFMA.

[118] *See* letter from Entergy.

[119] *See* letter from Chang.

[120] In addition, our estimates reflect the expected impact after the expiration of the temporary ''grandfather'' provisions in Form S–3, Form F–3 and Form F–10. Those ''grandfather'' provisions will expire three years after the effective date of the new rules.

[121] In Section II.A.4.ii above, we estimated that approximately four companies who made an offering between January 1, 2006 and August 15, 2008 would no longer be eligible to use Form S–3 and Form F–3. We further estimated that 16 issuers would become newly eligible to use Form S–3 and Form F–3. As a result, we estimate that a net of 12 issuers would have become eligible to use Form S–3 and Form F–3 over that approximately 31-month time period. For purposes of the PRA estimates, we estimate that over a 12-month time period that five issuers would become eligible to use Form S–3 or Form F–3 (approximately one-third of 12). We further estimate that four of those five will become eligible to use Form S–3 and one will become eligible to use Form F–3.

[122] Based on a review of Commission filings, since January 1, 2007, only 22 issuers have filed on Form F–9. As a result, we estimate that over a 12-month period, approximately six additional Form F–10s will be filed.

[123] We propose to rescind Form F–9, which will eliminate the PRA burden for that form, but we expect that the number of respondents on Form F–10 will increase as a result.

TABLE 1—CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES

	Current annual responses (A)	Proposed annual responses (B)	Current burden hours (C)	Increase/(Decrease) in burden hours (D)	Proposed burden hours (E) = C + D	Current professional costs (F)	Increase/(Decrease) in professional costs (G)	Proposed professional costs = F + G
Form S–1	768	764	186,687	(972)	185,715	$224,024,000	($1,166,792)	$222,857,208
Form S–3	2,065	2,069	243,927	472	244,399	292,711,500	566,996	293,278,496
Form F–1	42	41	18,975	(452)	18,523	22,757,400	(541,843)	22,215,557
Form F–3	106	107	4,426	42	4,468	5,310,600	50,100	5,360,700
Form F–10	75	81	469	36	505	562,500	45,000	607,500
Total				(874)			(1,046,539)	

IV. Cost-Benefit Analysis

A. Amendments

As discussed above, we are adopting rule amendments in light of Section 939A of the Dodd-Frank Act to eliminate references to credit ratings in our rules in order to reduce reliance on credit ratings.[124] Today's amendments seek to replace rule and form requirements of the Securities Act and the Exchange Act that rely on security ratings by NRSROs with alternative requirements that do not rely on ratings.

The Commission is revising the transaction eligibility requirements of Forms S–3 and F–3 and other rules and forms that refer to these eligibility requirements. Currently, these forms allow issuers who do not meet the forms' other transaction eligibility requirements to register primary offerings of non-convertible securities for cash if such securities are rated investment grade by an NRSRO. The eligibility standard of having an investment grade rating has been used to indicate whether an issuer is widely followed in the marketplace. The revised rules would replace this transaction eligibility requirement with a requirement that, for primary offerings of non-convertible securities, other than common equity, for cash, an issuer is eligible if:

(i) The issuer has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) The issuer has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) The issuer is a wholly-owned subsidiary of a WKSI as defined in Rule 405 under the Securities Act; or

(iv) The issuer is a majority-owned operating partnership of a REIT that qualifies as a WKSI; or

(v) The issuer discloses in the registration statement that it has a reasonable belief that it would have been eligible to register the securities offerings proposed to be registered under such registration statement pursuant to General Instruction I.B.2 of Form S–3 or Form F–3 in existence prior to the new rules, discloses the basis for such belief, and files the final prospectus for any such offering on or before the date that is three years from the effective date of the amendments. We are making conforming revisions to Form S–4, Form F–4 and Schedule 14A. We are also revising Rules 138, 139, and 168 under the Securities Act, which address certain communications by analysts and issuers, to be consistent with the revisions to Form S–3 and Form F–3. We are also removing Rule 134(a)(17) so that disclosure of credit ratings information is no longer covered by the safe harbor that deems certain communications not to be a prospectus or a free writing prospectus. Finally, we are rescinding Form F–9.

We are sensitive to the costs and benefits imposed by our rules. The discussion below focuses on the costs and benefits of the amendments we are making to implement the Dodd-Frank Act within our discretion under that Act, rather than the costs and benefits of the Dodd-Frank Act itself. The two types of costs and benefits may not be entirely separable to the extent that our discretion is exercised to realize the benefits intended by the Dodd-Frank Act.

B. Benefits

As we stated in the 2011 Proposing Release, we believe that having issued $1 billion of registered non-convertible securities over the prior three years would generally correspond with a wide following in the marketplace.[125] As described above, the amendments we are adopting today would allow additional issuers to remain eligible to use Form S–3 and Form F–3 based on a variety of criteria. The amendments would replace the investment grade criteria for eligibility to register offerings of non-convertible securities on Form S–3 or Form F–3. The criteria we are adopting today reserves the use of Form S–3 and Form F–3 for widely followed issuers while allowing a greater number of issuers to remain eligible to use those forms while also allowing some widely followed issuers to become newly eligible to use the forms.

Issuers will no longer be required to purchase ratings services in order to be eligible for registering a transaction on Form S–3 or Form F–3 and will benefit from not having to incur the associated costs of obtaining a credit rating to the extent that they decide not to obtain a credit rating for other uses. As a result, these rules could lessen the bargaining power rating agencies have with issuers (to the extent such bargaining power was artificially enhanced by the prior requirements of such forms), potentially lowering the cost of obtaining ratings. In addition, the removal of a provision in our forms requiring the use of a credit rating to establish eligibility for a type of registration generally reserved for widely followed issuers obviates a market externality that may have constituted a barrier to entry to potential competitors seeking to develop alternative methods of communicating creditworthiness to investors. Accordingly, removing any perceived imprimatur that may have resulted from the reference to credit ratings in Form S–3 and Form F–3 may increase

[124] *See* note 18 above and related text.

[125] *See* 2011 Proposing Release, *supra* note 15, at note 52.

competition in the financial services sector.

The change in the criteria would allow issuers of high yield securities or issuers of non-convertible securities (other than common equity) without a credit rating that were previously unable to avail themselves of the shelf offering process and forward incorporation by reference, to have faster access to capital markets and incur lower transaction costs.[126] These amendments therefore allow the set of issuers with credit risk profiles that are not ''investment grade'' but that are otherwise widely followed in the marketplace to have access to short-form registration and the shelf offering process. More broadly, to the extent that the eligibility criteria are a better measure of whether or not an issuer is widely followed than receipt of an investment grade credit rating, then any change to the eligible set of issuers would more closely follow the intent of allowing forward incorporation by reference for appropriate issuers.

We believe the benefits of rescinding Form F–9 would be to reduce redundancy by having multiple forms with the same requirements which would streamline the registration process for Canadian issuers.

We believe the benefits of the revisions to Rules 138, 139 and 168 will be to promote regulatory consistency by continuing to use the Form S–3 and Form F–3 standards to determine whether those rules can be relied on. In addition, we believe that removing Rule 134(a)(17) may have the benefit of reducing reliance on credit ratings because it would lessen the extent to which the Commission's rules provide an imprimatur to credit ratings, particularly those issued by NRSROs.

C. Costs

To the extent that the new eligibility standards result in some issuers who were previously eligible to use Forms S–3 and F–3 to register primary offerings of non-convertible securities other than common equity to be required to register on Form S–1,[127] this would result in increased costs of preparing and filing registration statements, which may decrease capital raising in registered offerings.[128] This would result in additional time spent in the offering process, and issuers would incur costs associated with preparing and filing post-effective amendments to the registration statement. In addition, the resulting loss of the ability to conduct a delayed offering ''off the shelf'' pursuant to Rule 415 under the Securities Act would result in costs due to the uncertainty an issuer might face regarding the ability to conduct offerings quickly at advantageous times. The increased costs of preparing and filing registration statements using Form S–1 or Form F–1 and the increased uncertainty regarding the issuer's ability to conduct offerings quickly at advantageous times are likely to increase an issuer's cost of capital. Moreover, this is not a one-time cost but would be incurred for each subsequent issuance.

One commentator believed the costs outweigh the benefits of the proposal.[129] That commentator estimated that a regulated insurance company registering non-variable annuity contracts on Form S–1 could face 250 hours of in-house legal time and 150 hours of business, outside counsel and auditor expenses if Form S–3 and Form F–3 were no longer available to such an issuer. The commentator believed the benefits noted in the proposing release were not significant enough to outweigh the costs and were inappropriate ''as collateral damage from legislation aimed at over-reliance on security ratings.'' [130] We expect the changes we have made to the proposal would limit the costs of the amendments since fewer companies would lose their ability to file on Form S–3 and Form F–3 as supported by our analysis of the issuers that issued non-convertible securities other than common equity between January 1, 2006 and August 15, 2008. In addition, we believe the ''grandfather'' provisions will also mitigate costs for any issuer that would become ineligible by giving such issuers time to adjust their capital raising practices.

We believe that the amendments could result in some issuers who are currently required to file on Form S–1 or Form F–1 becoming eligible to use Form S–3 or Form F–3. This could result in a cost to investors as there would be less information present in the prospectuses for these companies than there was previously. As a result, investors would have to seek out the Exchange Act reports (for example, by accessing the SEC Web site) of these issuers for company information which would no longer appear in the prospectus. However, we believe these costs might not be substantial to the extent that the new eligibility standards appropriately capture issuers with a wide market following for whom forward incorporation by reference is appropriate. Such new Form S–3 and Form F–3 issuers will also become eligible take advantage of the shelf offering process. This could result in additional costs to investors if they have less time to review available information before making an investment decision with respect to a takedown from a shelf registration statement.

If there are some issuers who become eligible to use Form S–3 or Form F–3 who are not widely followed, then there could be costs to investors if information about the issuer is not available or considered by the marketplace.

The amendments could also result in some issuers that would have been eligible to use Form S–3 or Form F–3 because of their investment grade ratings and those that continue to be eligible under the new widely followed standards to decide not to get their securities rated. This could result in a cost to the investors to the extent that credit ratings were providing additional information to the marketplace.

The amendments to Rules 138, 139 and 168 could result in somewhat higher compliance costs if it requires more effort to determine whether an issuer is eligible to use Form S–3 or Form F–3. An issuer is currently eligible to use Form S–3 or Form F–3 for offerings of non-convertible securities, other than common equity, if the non-convertible securities are investment grade, which is a single, objective, bright-line determination. The amendments adopted today will provide several alternative criteria to determine Form S–3 and Form F–3 eligibility,

[126] As discussed in Section II.A.4.ii above, we estimate that the amendments adopted today would result in 16 issuers who previously filed on Form S–1 or F–1 becoming eligible to file on Form S–3 or Form F–3.

[127] As discussed in Section II.A.4.ii above, we estimate that the amendments adopted today would result in four issuers no longer being eligible to use Form S–3 or Form F–3. As a result, these issuers would be required to file on Form S–1 or Form F–1.

[128] The ability to conduct primary offerings on short form registration statements confers significant advantages on eligible companies by reducing the costs and increasing the speed of conducting a registered offering. The time required to prepare and update Form S–3 or F–3 is significantly lower than that required for Forms S–1 and F–1 primarily because registration statements on Forms S–3 and F–3 can be automatically updated. Forms S–3 and F–3 permit registrants to forward incorporate required information by reference to disclosure in their Exchange Act filings. In addition, companies that are eligible to register primary offerings on Form S–3 and Form F–3 generally are able to conduct offerings on a delayed basis ''off the shelf'' without further staff review and clearance. This enables eligible issuers to take advantage of beneficial market conditions to improve their access to capital and may lower their cost of funds. *See* Section III, above, for a discussion of the estimates of the paperwork costs of preparing and filing on Form S–1 associated with the amendments that we have prepared for purposes of the PRA.

[129] *See* letter from Roundtable.

[130] *See* letter from Roundtable.

which may make it more difficult to determine at any given point in time whether an issuer is eligible to make an offering of non-convertible securities, other than common equity, on Form S–3 or Form F–3. As a result, determining whether a research report can be published within the safe harbors of Rule 138, 139, or whether certain business information may be released under Rule 168 may be more costly.

The amendment to remove Rule 134(a)(17) could be a cost to investors if ratings information is less available to them, to the extent such ratings information is useful to investors. In addition, to the extent that issuers decide to continue to include ratings information in communications that previously were made in reliance on the Rule 134 safe harbor, they may incur costs in order to ascertain whether including such information would require compliance with prospectus filing requirements.

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a) of the Exchange Act [131] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) prohibits the Commission from adopting any rule which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act [132] and Section 3(f) of the Exchange Act [133] require 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 would promote efficiency, competition, and capital formation.

Overall, we believe the changes will increase the efficiency of the shelf offering process by focusing eligibility on those issuers that are widely followed in the market and removing reliance on obtaining a particular credit rating. Our analysis indicates that the amendments will have two distinct effects. First, some issuers currently eligible to register primary offerings of non-convertible securities, other than common equity, on Forms S–3 and F–3 and to use the shelf offering process will lose their eligibility. Second, some issuers will become newly eligible to use Forms S–3 and F–3 and the shelf offering process. We believe that the rules will likely result in more widely followed issuers being eligible for short-form registration, which is why the rules may increase efficiency and promote capital formation. Issuers who become eligible to register offerings on Form S–3 and Form F–3 and avail themselves of the shelf offering process may now face relatively lower issuance costs, which would positively affect efficiency and capital formation of those issuers. As noted throughout this release, we anticipate that the number of such issuers would be small. In addition, we believe the ''grandfather'' provisions we are adopting will mitigate the disruption for issuers who may become ineligible to use Form S–3 or Form F–3 by giving them time to adjust their market practices. Because the number of eligible issuers will be roughly the same as under the previous criteria, we believe there would be a negligible impact on competition.

Although we do not believe the new rules will have a significant impact on the eligibility of issuers to use Form S–3 or Form F–3, by reducing reliance on credit ratings there could be an effect on the amount and cost of issuer information available to the market. Without a requirement for an issuer to receive an investment grade credit rating, issuers may have less of an incentive to have their securities rated. They may continue to have their securities rated for other reasons. However, to the extent issuers overall obtain fewer ratings, investors may have to place greater reliance on other financial information providers in their assessment of investor creditworthiness.

From one perspective, this may provide greater opportunity for other information providers to compete to provide credit evaluation services. If the resulting competition reduces the cost, and maintains or increases the quality, of information in the marketplace regarding credit-worthiness, then this may result in a lower cost of capital and/or improved capital allocation decisions. However, if rating agencies provide investors with a unique set of information that other information providers cannot easily replicate—for instance, if they have access to issuer private information that is not common knowledge to the market—then investors may lose access to certain, valuable information to the extent that issuers chose not to have their securities rated. This may result in less efficient capital allocation. We do not believe this outcome likely because issuers may still find it beneficial to obtain a credit rating in order to provide that information to potential investors. As a result, we believe that the net effect of this rule will be to increase the level of informational efficiency.

The Commission believes that the rescission of Form F–9 could reduce confusion regarding the appropriate form to use for the registration of securities by Canadian issuers, which could result in increased market efficiency.

VI. Regulatory Flexibility Act Certification

Under Section 605(b) of the Regulatory Flexibility Act,[134] we certified that, when adopted, the proposals would not have a significant economic impact on a substantial number of small entities. We included the certification in Part VIII of the 2011 Proposing Release. We did not receive any comments on the certification.

VII. Statutory Authority and Text of Rule and Form Amendments

We are adopting the amendments contained in this document under the authority set forth in Sections 6, 7, 10, 19(a) of the Securities Act and Sections 14 and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Parts 200, 229, 230, 232, 239, 240, and 249

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations, is amended as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

* * * * *

Subpart N—Commission Information Collection Requirements Under the Paperwork Reduction Act: OMB Control Numbers

■ 1. The authority citation for Part 200, Subpart N, continues to read as follows:

Authority: 44 U.S.C. 3506; 44 U.S.C. 3507.

§ 200.800 [Amended]

■ 2. Effective December 31, 2012, amend § 200.800 by removing from paragraph (b) the entry for ''Form F–9''.

[131] 15 U.S.C. 78w(a).

[132] 15 U.S.C. 77b(b).

[133] 15 U.S.C. 78c(f).

[134] 5 U.S.C. 605(b).

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

■ 3. The authority citation for Part 229 continues to read, in part, 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, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l,* 78m, 78n, 78n–1, 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.

* * * * *

§ 229.10 [Amended]

■ 4. Effective December 31, 2012, amend § 229.10 by:

■ a. Removing the penultimate sentence from paragraph (c) introductory text;

■ b. Removing from the first sentence in paragraph (c)(1)(i) the acronym ''NRSRO'' and adding in its place the phrase ''nationally recognized statistical rating organization (NRSRO)''; and

■ c. Removing the last sentence from paragraph (c)(1)(i).

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 5. The general authority citation for Part 230 is revised to read as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l,* 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, 80a–37, and Pub. L. 111–203, § 939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

■ 6. Amend § 230.134 by revising paragraph (a) introductory text, revising paragraph (a)(6), and removing and reserving paragraph (a)(17).

The revisions read as follows:

§ 230.134 Communications not deemed a prospectus.

* * * * *

(a) Such communication may include any one or more of the following items of information, which need not follow the numerical sequence of this paragraph, provided that, except as to paragraphs (a)(4) through (6) of this section, the prospectus included in the filed registration statement does not have to include a price range otherwise required by rule:

* * * * *

(6) In the case of a fixed income security with a fixed (non-contingent) interest rate provision, the yield or, if the yield is not known, the probable yield range, as specified by the issuer or the managing underwriter or underwriters and the yield of fixed income securities with comparable maturity and security rating;

* * * * *

(17) [Reserved]

* * * * *

■ 7. Amend § 230.138 by revising paragraph (a)(2)(ii)(B)(*2*) to read as follows:

§ 230.138 Publications or distributions of research reports by brokers or dealers about securities other than those they are distributing.

(a) * * *

(2) * * *

(ii) * * *

(B) * * *

(*2*) Is issuing non-convertible securities, other than common equity, and the issuer meets the provisions of General Instruction I.B.2. of Form F–3 (referenced in 17 CFR 239.33 of this chapter); and

* * * * *

■ 8. Amend § 230.139 by revising paragraphs (a)(1)(i)(A)(*1*)(*ii*) and (a)(1)(i)(B)(*2*)(*ii*) to read as follows:

§ 230.139 Publications or distributions of research reports by brokers or dealers distributing securities.

(a) * * *

(1) * * *

(i) * * *

(A)(*1*) * * *

(*ii*) At the date of reliance on this section, is, or if a registration statement has not been filed, will be, offering non-convertible securities, other than common equity, and meets the requirements for the General Instruction I.B.2. of Form S–3 or Form F–3 (referenced in 17 CFR 239.13 and 17 CFR 239.33 of this chapter); or

* * * * *

(B) * * *

(*2*) * * *

(*ii*) Is issuing non-convertible securities, other than common equity, and meets the provisions of General Instruction I.B.2. of Form F–3 (referenced in 17 CFR 239.33 of this chapter); and

* * * * *

■ 9. Amend § 230.168 by revising paragraph (a)(2)(ii)(B) to read as follows:

§ 230.168 Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information and forward-looking information.

* * * * *

(a) * * *

(2) * * *

(ii) * * *

(B) Is issuing non-convertible securities, other than common equity, and meets the provisions of General Instruction I.B.2. of Form F–3 (referenced in 17 CFR 239.33 of this chapter); and

* * * * *

§ 230.467 [Amended]

■ 10. Effective December 31, 2012, amend § 230.467 by removing:

■ a. ''F–9,'' from the heading;

■ b. ''Form F–9 or'' and ''§ 239.39 or'' from the second sentence of paragraph (a); and

■ c. ''Form F–9 or'' from the first sentence of paragraph (b).

§ 230.473 [Amended]

■ 11. Effective December 31, 2012, amend § 230.473 by removing ''F–9 or'' and ''§ 239.39 or'' from paragraph (d).

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 12. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78o(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.;* and 18 U.S.C. 1350.

* * * * *

§ 232.405 [Amended]

■ 13. Effective December 31, 2012, amend § 232.405 by removing:

■ a. ''both Form F–9 (§ 239.39 of this chapter) and'' from the second sentence of Preliminary Note 1;

■ b. ''either Form F–9 or'' from paragraphs (a)(2) introductory text, (a)(3), and (a)(4); and

■ c. ''both Form F–9 and'' and ''Form F–9 and'' in the second sentence of Note to § 232.405, and ''both Form F–9 and'' in the penultimate sentence of Note to § 232.405.

PART 239 —FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 14. The general authority citation for part 239 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l,* 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll,* 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, 80a–37, and Pub. L. No. 111–203, § 939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

■ 15. Amend § 239.13 by revising the paragraph heading to the undesignated paragraph following paragraph (b)(1)

and by revising paragraphs (b)(2) and (b)(5) to read as follows:

§ 239.13 Form S–3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.

* * * * *

(b) * * *

Instruction to paragraph (b)(1): * * *

(2) *Primary Offerings of Non-Convertible Securities Other than Common Equity.* Non-convertible securities, other than common equity, to be offered for cash by or on behalf of a registrant, provided the registrant:

(i) Has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) Has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or

(iii) is a wholly-owned subsidiary of a well-known seasoned issuer (as defined in 17 CFR 230.405); or

(iv) Is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer (as defined in 17 CFR 230.405); or

(v) Discloses in the registration statement that it has a reasonable belief that it would have been eligible to use this Form S–3 as of September 1, 2011 because it is registering a primary offering of non-convertible investment grade securities, discloses the basis for such belief, and files a final prospectus for an offering pursuant to such registration statement on this Form S–3 on or before September 2, 2014.

Instruction to paragraph (b)(2). For purposes of paragraph (b)(2)(i) of this section, an insurance company, as defined in Section 2(a)(13) of the Securities Act of 1933 (15 U.S.C. 77b(a)(13), when using this Form S–3 to register offerings of securities subject to regulation under the insurance laws of any State or Territory of the United States or the District of Columbia (''insurance contracts''), may include purchase payments or premium payments for insurance contracts, including purchase payments or premium payments for variable insurance contracts (not including purchase payments or premium payments initially allocated to investment options that are not registered under the Securities Act of 1933 (15 U.S.C. 77a)), issued in offerings registered under the Securities Act over the prior three years. For purposes of paragraph (b)(ii) of this section, an insurance company, as defined in Section 2(a)(13) of the Securities Act of 1933, when using this Form S–3 to register offerings of insurance contracts, may include the contract value, as of the measurement date, of any outstanding insurance contracts, including variable insurance contracts (not including the value allocated as of the measurement date to investment options that are not registered under the Securities Act of 1933), issued in offerings registered under the Securities Act of 1933.

* * * * *

(5) The securities are investment grade securities. An asset-backed security is an investment grade security if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in 17 CFR 240.15c3–1(c)(2)(vi)(F)) has rated the security in one of its generic rating categories that signifies investment grade; typically, the four highest rating categories (within which there may be sub-categories or gradations indicating relative standing) signify investment grade.

* * * * *

■ 16. Amend Form S–3 (referenced in 17 CFR 239.13) by:

■ a. Revising General Instruction I.B.2.;

■ b. Revising General Instruction I.B.5(a)(i).; and

■ c. Revising Instruction 3 to the signature block to remove the word ''Requirements'' and add in its place the word ''Requirement'' and to remove the phrase ''B.2. or''.

The revision reads as follows:

Note: The text of Form S–3 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S–3

Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

I. Eligibility Requirements for Use of Form S–3

* * * * *

B. Transaction Requirements. * * *

2. *Primary Offerings of Non-Convertible Securities Other than Common Equity.* Non-convertible securities, other than common equity, to be offered for cash by or on behalf of a registrant, provided the registrant (i) has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or (ii) has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or (iii) is a wholly-owned subsidiary of a well-known seasoned issuer (as defined in 17 CFR 230.405); or (iv) is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer (as defined in 17 CFR 230.405); or (v) discloses in the registration statement that it has a reasonable belief that it would have been eligible to use Form S–3 as of September 1, 2011 because it is registering a primary offering of non-convertible investment grade securities, discloses the basis for such belief, and files a final prospectus for an offering pursuant to such registration statement on Form S–3 on or before September 2, 2014.

Instruction. For purposes of Instruction I.B.2(i) above, an insurance company, as defined in Section 2(a)(13) of the Securities Act, when using this Form to register offerings of securities subject to regulation under the insurance laws of any State or Territory of the United States or the District of Columbia (''insurance contracts''), may include purchase payments or premium payments for insurance contracts, including purchase payments or premium payments for variable insurance contracts (not including purchase payments or premium payments initially allocated to investment options that are not registered under the Securities Act), issued in offerings registered under the Securities Act over the prior three years. For purposes of Instruction I.B.2(ii) above, an insurance company, as defined in Section 2(a)(13) of the Securities Act, when using this Form to register offerings of insurance contracts, may include the contract value, as of the measurement date, of any outstanding insurance contracts, including variable insurance contracts (not including the value allocated as of the measurement date to investment options that are not registered under the Securities Act), issued in offerings registered under the Securities Act.

* * * * *

5. *Offerings of Investment Grade Asset-Backed Securities.*

(a) * * *

(i) The securities are ''investment grade securities.'' An asset-backed security is an ''investment grade security'' if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in Rule 15c3–1(c)(2)(vi)(F) under the Exchange Act (§ 240.15c3–1(c)(2)(vi)(F)) has rated the security in one of its generic rating categories which signifies investment grade; typically, the four highest rating categories (within which there may be sub-categories or gradations indicating relative standing) signify investment grade.

* * * * *

■ 17. Amend Form S–4 (referenced in 17 CFR 239.25) by revising General Instruction B.1.a.(ii)(B) to read as follows:

Note: The text of Form S–4 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form S–4

Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

* * * * *

B. Information with Respect to the Registrant.

1. * * *

a. * * *

(ii) * * *

(B) Non-convertible debt or preferred securities are to be offered pursuant to this registration statement and the requirements of General Instruction I.B.2. of Form S–3 have been met for the securities to be registered on this registration statement; or

* * * * *

■ 18. Amend § 239.33 by revising paragraph (b)(2) to read as follows:

§ 239.33 Form F–3, for registration under the Securities Act of 1933 of securities of certain foreign private issuers offered pursuant to certain types of transactions.

* * * * *

(b) * * *

(2) *Primary Offerings of Non-Convertible Securities Other than Common Equity.* Non-convertible securities, other than common equity, to be offered for cash by or on behalf of a registrant, provided the registrant:

(i) Has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or

(ii) Has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act of 1933 (15 U.S.C. 77a); or

(iii) Is a wholly-owned subsidiary of a well-known seasoned issuer (as defined in 17 CFR 230.405); or

(iv) Is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer (as defined in 17 CFR 230.405); or

(v) Discloses in the registration statement that it has a reasonable belief that it would have been eligible to use Form F–3 as of September 1, 2011 because it is registering a primary offering of non-convertible investment grade securities, discloses the basis for such belief, and files a final prospectus for an offering pursuant to such registration statement on Form F–3 on or before September 2, 2014.

Instruction to paragraph (b)(2). For purposes of paragraph (b)(2)(i) of this section, an insurance company, as defined in Section 2(a)(13) of the Securities Act of 1933 (15 U.S.C. 77b(a)(13)), when using this Form F–3 to register offerings of securities subject to regulation under the insurance laws of any State or Territory of the United States or the District of Columbia (''insurance contracts''), may include purchase payments or premium payments for insurance contracts, including purchase payments or premium payments for variable insurance contracts (not including purchase payments or premium payments initially allocated to investment options that are not registered under the Securities Act of 1933 (15 U.S.C. 77a)), issued in offerings registered under the Securities Act of 1933 over the prior three years. For purposes of paragraph (b)(ii) of this section, an insurance company, as defined in Section 2(a)(13) of the Securities Act of 1933, when using this Form F–3 to register offerings of insurance contracts, may include the contract value, as of the measurement date, of any outstanding insurance contracts, including variable insurance contracts (not including the value allocated as of the measurement date to investment options that are not registered under the Securities Act of 1933), issued in offerings registered under the Securities Act of 1933.

* * * * *

■ 19. Amend Form F–3 (referenced in 17 CFR 239.33) by:

■ a. Revising General Instruction I.B.2.; and

■ b. Removing Instruction 3 to the signature block.

The revision reads as follows:

Note: The text of Form F–3 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form F–3

Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

I. Eligibility Requirements for Use of Form F–3

* * * * *

B. Transaction Requirements * * *

2. *Primary Offerings of Non-Convertible Securities Other than Common Equity.* Non-convertible securities, other than common equity, to be offered for cash by or on behalf of a registrant, provided the registrant (i) has issued (as of a date within 60 days prior to the filing of the registration statement) at least $1 billion in non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Securities Act, over the prior three years; or (ii) has outstanding (as of a date within 60 days prior to the filing of the registration statement) at least $750 million of non-convertible securities, other than common equity, issued in primary offerings for cash, not exchange, registered under the Securities Act; or (iii) is a wholly-owned subsidiary of a well-known seasoned issuer (as defined in 17 CFR 230.405); or (iv) is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer (as defined in 17 CFR 230.405); or (v) discloses in the registration statement that it has a reasonable belief that it would have been eligible to use Form F–3 as of September 1, 2011 because it is registering a primary offering of non-convertible investment grade securities, discloses the basis for such belief, and files a final prospectus for an offering pursuant to such registration statement on Form F–3 on or before September 2, 2014.

Instruction. For purposes of Instruction I.B.2(i) above, an insurance company, as defined in Section 2(a)(13) of the Securities Act, when using this Form to register offerings of securities subject to regulation under the insurance laws of any State or Territory of the United States or the District of

Columbia (''insurance contracts''), may include purchase payments or premium payments for insurance contracts, including purchase payments or premium payments for variable insurance contracts (not including purchase payments or premium payments initially allocated to investment options that are not registered under the Securities Act), issued in offerings registered under the Securities Act over the prior three years. For purposes of Instruction I.B.2(ii) above, an insurance company, as defined in Section 2(a)(13) of the Securities Act, when using this Form to register offerings of insurance contracts, may include the contract value, as of the measurement date, of any outstanding insurance contracts, including variable insurance contracts (not including the value allocated as of the measurement date to investment options that are not registered under the Securities Act), issued in offerings registered under the Securities Act.

* * * * *

■ 20. Amend Form F–4 (referenced in 17 CFR 239.34) by revising General Instruction B.1(a)(ii)(B).

The revision reads as follows:

Note: The text of Form F–4 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form F–4

Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

* * * * *

B. Information with Respect to the Registrant

1. * * *

a. * * *

(ii) * * *

(B) Non-convertible debt or preferred securities are to be offered pursuant to this registration statement and the requirements of General Instruction I.B.2. of Form F–3 have been met for the securities to be registered on this registration statement; or

* * * * *

§ 239.38 [Amended]

■ 21. Effective December 31, 2012, amend § 239.38 by removing ''Form F–9,'' from paragraph (h)(3).

Note: The text of Form F–8 does not, and the following amendment will not, appear in the Code of Federal Regulations.

■ 22. Effective December 31, 2012, amend Form F–8 (referenced in 17 CFR 239.38) by removing ''Form F–9,'' from each of paragraph A.(3) of General Instruction III and paragraph B. of General Instruction V.

§ 239.39 [Removed and Reserved]

■ 23. Effective December 31, 2012, remove and reserve § 239.39 (referencing Form F–9).

§ 239.40 [Amended]

■ 24. Effective December 31, 2012, amend § 239.40 by removing ''Form F–9,'' from paragraph (c)(4).

■ 25. Effective December 31, 2012, amend Form F–10 (referenced in 17 CFR 239.40) by:

■ a. In General Instruction I.C.(3), removing ''and'' after the semi-colon;

■ b. In General Instruction I.C.(4), removing ''Form F–9,'' removing the period, and adding in its place ''; and''; and

■ c. Adding paragraph C.(5) of General Instruction I to read as follows:

Note: The text of Form F–10 does not, and this amendment will not, appear in the Code of Federal Regulations.

Form F–10

Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

C. Form F–10 is available to any Registrant that:

(1) * * *

(5) if it does not meet the requirements of I.C.(4) or I.H., discloses in Part II of the registration statement that it has a reasonable belief that it would have been eligible to make an offering of investment grade, non-convertible securities on Form F–9 as of December 30, 2012, discloses the basis for such belief, and files a final prospectus for an offering under the registration statement on or prior to December 31, 2015.

* * * * *

§ 239.41 [Amended]

■ 26. Effective December 31, 2012, amend § 239.41 by removing ''Form F–9,'' from paragraph (h)(3).

■ 27. Effective December 31, 2012, amend Form F–80 (referenced in 17 CFR 239.41) by removing ''Form F–9'' in paragraph A.(3) of General Instruction III and paragraph B. of General Instruction V.

Note: The text of Form F–80 does not, and this amendment will not, appear in the Code of Federal Regulations.

■ 28. Effective December 31, 2012, amend § 239.42 by removing ''F–9,'' from the heading and from each of paragraphs (a) and (e).

■ 29. Effective December 31, 2012, amend Form F–X (referenced in 17 CFR 239.42) by removing ''F–9,'' from each of paragraphs (a) and (e) of General Instruction I, and each of paragraphs (a) and (c) of General Instruction II.F.

Note: The text of Form F–X does not, and this amendment will not, appear in the Code of Federal Regulations.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 30. The general authority citation for part 240 is revised 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, 78n–1, 78o, 78o–4, 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, 12 U.S.C. 5221(e)(3), and Pub. L. 111–203, § 939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

■ 31. Amend § 240.14a–101 by revising Note E(2)(ii) to read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

* * * * *

Notes:

* * * * *

E. * * *

(2) * * *

(ii) Action is to be taken as described in Items 11, 12, and 14 of this schedule which concerns non-convertible debt or preferred securities issued by a registrant meeting the requirements of General Instruction I.B.2. of Form S–3 (referenced in 17 CFR 239.13 of this chapter); or

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 32. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

§ 249.240 [Amended]

■ 33. Effective December 31, 2012, amend § 249.240f by:

■ a. Removing ''F–9,'' in paragraph (a) introductory text;

■ b. Redesignating the ''Note'' following paragraph (a) introductory text as ''Note to paragraph (a)''; and

■ c. Removing in paragraph (b)(4) introductory text the phrase ''; *provided,*

however, no market value threshold need be satisfied in connection with non-convertible securities eligible for registration on Form F–9 (§ 239.39 of this chapter)''.

■ 34. Effective December 31, 2012, amend Form 40–F (referenced in 17 CFR 249.240f) by:

■ a. In General Instruction A.(i), removing ''F–9'';

■ b. Removing from paragraph (2)(iv) of General Instruction A. the phrase ''; provided, however, that no market value threshold need be satisfied in connection with non-convertible securities eligible for registration on Form F–9'' and adding in its place the phrase ''or the Registrant filed a Form F–9 with the Commission on or before December 30, 2012''; and

■ c. Revising paragraph (2) of General Instruction C. to read as follows:

(2) Any financial statements, other than interim financial statements, included in this Form by registrants registering securities pursuant to Section 12 of the Exchange Act or reporting pursuant to the provisions of Section 13(a) or 15(d) of the Exchange Act must be reconciled to U.S. GAAP as required by Item 17 of Form 20–F under the Exchange Act, unless this Form is filed with respect to a reporting obligation under Section 15(d) that arose solely as a result of a filing made on Form F–7, F–8, F–9 or F–80, in which case no such reconciliation is required.

Note: The text of Form 40–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Dated: July 27, 2011.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19421 Filed 8–2–11; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[TD 9541]

RIN 1545–BJ60

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

RIN 1210–AB44

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[CMS–9992–IFC2]

45 CFR Part 147

RIN 0938–AQ07

Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act

AGENCIES: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Interim final rules with request for comments.

SUMMARY: This document contains amendments to the interim final regulations implementing the rules for group health plans and health insurance coverage in the group and individual markets under provisions of the Patient Protection and Affordable Care Act regarding preventive health services.

DATES: *Effective date.* These interim final regulations are effective on August 1, 2011.

Comment date. Comments are due on or before September 30, 2011.

Applicability dates. These interim final regulations generally apply to group health plans and group health insurance issuers on August 1, 2011.

ADDRESSES: Written comments may be submitted to any of the addresses specified below. Any comment that is submitted to any Department will be shared with the other Departments. Please do not submit duplicates.

All comments will be made available to the public. *WARNING*: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments are posted on the Internet exactly as received, and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

Department of Labor. Comments to the Department of Labor, identified by RIN 1210–AB44, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the instructions for submitting comments.

• *E-mail*: *E-OHPSCA2713.EBSA@dol.gov*.

• *Mail or Hand Delivery*: Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N–5653, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, *Attention*: RIN 1210–AB44.

Comments received by the Department of Labor will be posted without change to *http://www.regulations.gov* and *http://www.dol.gov/ebsa*, and available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Washington, DC 20210.

Department of Health and Human Services. In commenting, please refer to file code CMS–9992–IFC2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov*. Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–9992–IFC2, P.O. Box 8010, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–9992–IFC2, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments ONLY to the

following addresses prior to the close of the comment period: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–4492 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov*. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. EST. To schedule an appointment to view public comments, phone 1–800–743–3951.

Internal Revenue Service. Comments to the IRS, identified by REG–120391–10, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail*: CC:PA:LPD:PR (REG–120391–10), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.
- *Hand or courier delivery*: Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–120391–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington DC 20224.

All submissions to the IRS will be open to public inspection and copying in room 1621, 1111 Constitution Avenue, NW., Washington, DC from 9 a.m. to 4 p.m.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Beth Baum, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335; Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 622–6080; Robert Imes, Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, at (410) 786–1565.

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the Department of Labor's Web site (*http://www.dol.gov/ebsa*). In addition, information from HHS on private health insurance for consumers can be found on the Centers for Medicare & Medicaid Services (CMS) Web site (*http://cciio.cms.gov*) and information on health reform can be found at *http://www.HealthCare.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

The Patient Protection and Affordable Care Act, Public Law 111–148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act (the Reconciliation Act), Public Law 111–152, was enacted on March 30, 2010 (collectively known as the ''Affordable Care Act''). The Affordable Care Act reorganizes, amends, and adds to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The term ''group health plan'' includes both insured and self-insured group health plans.[1] The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (the Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and make them applicable to group health plans, and health insurance issuers providing health insurance coverage in connection with group health plans. The PHS Act sections incorporated by this reference are sections 2701 through 2728. PHS Act sections 2701 through 2719A are substantially new, though they incorporate some provisions of prior law. PHS Act sections 2722 through 2728 are sections of prior law renumbered, with some, mostly minor, changes.

Subtitles A and C of title I of the Affordable Care Act amend the requirements of title XXVII of the PHS Act (changes to which are incorporated into ERISA section 715). The preemption provisions of ERISA section 731 and PHS Act section 2724[2] (implemented in 29 CFR 2590.731(a) and 45 CFR 146.143(a)) apply so that the requirements of part 7 of ERISA and title XXVII of the PHS Act, as amended by the Affordable Care Act, are not to be ''construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group or individual health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement'' of the Affordable Care Act. Accordingly, State laws that impose requirements on health insurance issuers that are stricter than the requirements imposed by the Affordable Care Act are not superseded by the Affordable Care Act.

Section 2713 of the PHS Act, as added by the Affordable Care Act and incorporated under section 715(a)(1) of ERISA and section 9815(a)(1) of the Code, specifies that a group health plan and a health insurance issuer offering group or individual health insurance coverage provide benefits for and prohibit the imposition of cost-sharing with respect to:

- Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force (Task Force) with respect to the individual involved.[3]

[1] The term ''group health plan'' is used in title XXVII of the PHS Act, part 7 of ERISA, and chapter 100 of the Code, and is distinct from the term ''health plan,'' as used in other provisions of title I of the Affordable Care Act. The term ''health plan'' does not include self-insured group health plans.

[2] Code section 9815 incorporates the preemption provisions of PHS Act section 2724. Prior to the Affordable Care Act, there were no express preemption provisions in chapter 100 of the Code.

[3] Under PHS Act section 2713(a)(5), the Task Force recommendations regarding breast cancer screening, mammography, and prevention issued in or around November of 2009 are not to be considered current recommendations on this subject for purposes of PHS Act section 2713(a)(1).

• Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention (Advisory Committee) with respect to the individual involved. A recommendation of the Advisory Committee is considered to be ''in effect'' after it has been adopted by the Director of the Centers for Disease Control and Prevention. A recommendation is considered to be for routine use if it appears on the Immunization Schedules of the Centers for Disease Control and Prevention.

• With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (HRSA).

• With respect to women, preventive care and screening provided for in comprehensive guidelines supported by HRSA (not otherwise addressed by the recommendations of the Task Force), which will be commonly known as HRSA's Women's Preventive Services: Required Health Plan Coverage Guidelines.

The requirements to cover recommended preventive services without any cost-sharing do not apply to grandfathered health plans.[4] The Departments previously issued interim final regulations implementing PHS Act section 2713; these interim final rules were published in the **Federal Register** on July 19, 2010 (75 FR 41726). For the reasons explained below, the Departments are now issuing an amendment to these interim final rules.

II. Overview of the Amendment to the Interim Final Regulations

The interim final regulations provided that a group health plan or health insurance issuer must cover certain items and services, without cost-sharing, as recommended by the U.S. Preventive Services Task Force, the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, and the Health Resources and Services Administration. Notably, to the extent not described in the U.S. Preventive Services Task Force recommendations, HRSA was charged with developing comprehensive guidelines for preventive care and screenings with respect to women (*i.e.*, the Women's Preventive Services: Required Health Plan Coverage Guidelines or ''HRSA Guidelines''). The interim final regulations also require that changes in the required items and services be implemented no later than plan years (in the individual market, policy years) beginning on or after the date that is one year from when the new recommendation or guideline is issued.

In response to the request for comments on the interim final regulations, the Departments received considerable feedback regarding which preventive services for women should be considered for coverage under PHS Act section 2713(a)(4). Most commenters, including some religious organizations, recommended that HRSA Guidelines include contraceptive services for all women and that this requirement be binding on all group health plans and health insurance issuers with no religious exemption. However, several commenters asserted that requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom. One commenter noted that some religious employers do not currently cover such benefits under their group health plan due to their religious beliefs.

The Departments note that PHS Act section 2713(a)(4) gives HRSA the authority to develop comprehensive guidelines for additional preventive care and screenings for women ''for purposes of this paragraph.'' In other words, the statute contemplated HRSA Guidelines that would be developed with the knowledge that certain group health plans and health insurance issuers would be required to cover the services recommended without cost-sharing, unlike the other guidelines referenced in section 2713(a), which pre-dated the Affordable Care Act and were originally issued for purposes of identifying the non-binding recommended care that providers should provide to patients. These HRSA Guidelines exist solely to bind non-grandfathered group health plans and health insurance issuers with respect to the extent of their coverage of certain preventive services for women. In the Departments' view, it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate. Specifically, the Departments seek to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions. Such an accommodation would be consistent with the policies of States that require contraceptive services coverage, the majority of which simultaneously provide for a religious accommodation.

In light of the above, the Departments are amending the interim final rules to provide HRSA additional discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned. The amendment to the interim final rules provides HRSA with the discretion to establish this exemption. Consistent with most States that have such exemptions, as described below, the amended regulations specify that, for purposes of this policy, a religious employer is one that: (1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code. Section 6033(a)(3)(A)(i) and (iii) refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order. The definition of religious employer, as set forth in the amended regulations, is based on existing definitions used by most States that exempt certain religious employers from having to comply with State law requirements to cover contraceptive services. We will be accepting comments on this definition as well as alternative definitions, such as those that have been developed under Title 26 of the United States Code. The definition set forth here is intended to reasonably balance the extension of any coverage of contraceptive services under the HRSA Guidelines to as many women as possible, while respecting the unique relationship between certain religious employers and their employees in certain religious positions. The change in policy effected by this amendment to these interim final rules is intended solely for purposes of PHS Act section 2713 and the companion provisions of ERISA and the Internal Revenue Code.

Because HRSA's discretion to establish an exemption applies only to group health plans sponsored by certain

Thus, the recommendations regarding breast cancer screening, mammography, and prevention issued by the Task Force prior to those issued in or around November of 2009 (that is, those issued in 2002) will be considered current until new recommendations in this area are issued by the Task Force or appear in comprehensive guidelines supported by HRSA concerning preventive care and screenings for women, which will be commonly known as HRSA's Women's Preventive Services: Required Health Plan Coverage Guidelines.

[4] See 26 CFR 54.9815–1251T, 29 CFR 2590.715–1251 and 45 CFR 147.140 (75 FR 34538, June 17, 2010).

religious employers and group health insurance offered in connection with such plans, health insurance issuers in the individual health insurance market would not be covered under any such exemption.

III. Interim Final Regulations and Waiver of Delay of Effective Date

Section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act authorize the Secretaries of the Treasury, Labor, and HHS (collectively, the Secretaries) to promulgate any interim final rules that they determine are appropriate to carry out the provisions of chapter 100 of the Code, part 7 of subtitle B of title I of ERISA, and part A of title XXVII of the PHS Act, which include PHS Act sections 2701 through 2728 and the incorporation of those sections into ERISA section 715 and Code section 9815. The amendments promulgated in this rulemaking carry out the provisions of these statutes. Therefore, the foregoing interim final rule authority applies to these amendments.

Under the Administrative Procedure Act (APA) (5 U.S.C. 551, *et seq.*), while a general notice of proposed rulemaking and an opportunity for public comment is generally required before promulgation of regulations, an exception is made when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. The provisions of the APA that ordinarily require a notice of proposed rulemaking do not apply here because of the specific authority to issue interim final rules granted by section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act.

Even if the APA requirements for notice and comment were applicable to these regulations, they have been satisfied. This is because the Secretaries find that providing for an additional opportunity for public comment is unnecessary, as the July 19, 2010 interim final rules implementing section 2713 of the PHS Act provided the public with an opportunity to comment on the implementation of the preventive services requirements in this provision, and the amendments made in these interim final rules in fact are based on such public comments. Specifically, commenters expressed concerns that HRSA-supported guidelines issued under section 2713(a)(4) that included coverage of contraceptive services could impinge upon the religious freedom of certain religious employers. The flexibility that is afforded under these amendments is being provided to HRSA in order to allow HRSA the discretion to accommodate, in a balanced way, as discussed above, these commenter concerns.

In addition, the Departments have determined that an additional opportunity for public comment would be impractical and contrary to the public interest. The requirement in section 2713(a)(4) that preventive services supported by HRSA be provided without cost-sharing took effect at the beginning of the first plan or policy year beginning on or after September 23, 2010. At that time, however, HRSA had not issued any such guidelines. Under the July 19, 2010 interim final rules, group health plans and insurance issuers do not have to begin covering preventive services supported in HRSA guidelines until the first plan or policy year that begins one year after the guidelines are issued. Thus, while the law requiring coverage of recommended women's preventive health services was enacted on March 23, 2010, and has been in effect since September 23, 2010, no such guidelines have yet been issued, and it will be at least a full year after they are issued before group health plans and issuers will be required to start covering preventive services recommended in the guidelines without cost sharing.

The July 19, 2010 interim final rules indicated that HRSA expected to issue guidelines by August 1, 2011. After considering public comments raising the issue addressed in these amendments, however, the Departments determined that HRSA should be granted the discretion to address the commenter concerns at issue prior to issuing guidelines under section 2713(a)(4). Many college student policy years begin in August and an estimated 1.5 million young adults are estimated to be covered by such policies.[5] Providing an opportunity for public comment as described above would mean that the guidelines could not be issued until after August of 2011. This delay would mean that many students could not benefit from the new prevention coverage without cost-sharing following from the issuance of the guidelines until the 2013–14 school year, as opposed to the 2012–13 school year. Similarly, 2008 data from the Department of Labor indicate that over 4 million Americans have ERISA group health plan coverage that starts in August or September; they too would experience over a year's delay in the receipt of the new benefit if the public comment period delayed the issuance of the guidance for over a month. The Departments have determined that such a delay in implementation of the statutory requirement that women receive vital preventive services without cost-sharing would be contrary to the public interest because it could result in adverse health consequences that may not otherwise have occurred.

While the Departments have determined that, even if the APA were applicable, issuing these regulations in proposed form, so they would not become effective until after public comment, would be contrary to the public interest in the case of these amendments, the Departments are issuing these amendments as interim final rules so as to provide the public with an opportunity for public comment on these amendments.

The APA also generally requires that a final rule be effective no sooner than 30 days after the date of publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds good cause why the effective date should not be delayed, and the agency incorporates a statement of the findings and its reasons in the rule issued.

As indicated above, many college student policy years begin in August. Delaying the effective date of this amendment by 30 days would mean that the HRSA guidelines could not be issued until after August of 2011. This delay would mean many students could not benefit from the new prevention coverage without cost-sharing following from the issuance of the guidelines until the 2013–14 school year, as opposed to the 2012–13 school year. As discussed above, all other participants, beneficiaries and enrollees in plans or policies with a plan or a policy year beginning in the months between August 1 and whenever a final rule would be published should the Departments provide a pre-promulgation opportunity for public comment would face a similar one-year delay in receiving these important health benefits. The Departments have determined that such a delay in implementation of the statutory requirement that women receive vital preventive services without cost-sharing would be impracticable and contrary to the public interest because it could result in adverse health consequences that may not otherwise have occurred. Therefore, the Departments are waiving the 30-day delay in effective date of these amendments.

[5] Department of Health and Human Services, Notice of Proposed Rulemaking on Student Health Insurance Coverage (76 FR 7767, February 22, 2011).

IV. Economic Impact and Paperwork Burden

A. Executive Orders 13563 and 12866—Department of Labor and Department of Health and Human Services

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

1. Need for Regulatory Action

As stated earlier in this preamble, the Departments previously issued interim final regulations implementing PHS Act section 2713 that were published in the **Federal Register** on July 19, 2010 (75 FR 41726). Comments received in response to the interim final regulations raised the issue of imposing on certain religious employers through binding guidelines the requirement to cover contraceptive services that would be in conflict with the religious tenets of the employer. The Departments have determined that it is appropriate to amend the interim final rules to provide HRSA the discretion to exempt from its guidelines group health plans maintained by certain religious employers where contraceptive services are concerned.

2. Anticipated Effects

The Departments expect that this amendment will not result in any additional significant burden or costs to the affected entities.

B. Special Analyses—Department of the Treasury

Notwithstanding the determinations of the Department of Labor and Department of Health and Human Services, for purposes of the Department of the Treasury, it has been determined that this Treasury decision is not a significant regulatory action for purposes of Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the APA (5 U.S.C. chapter 5) does not apply to these interim final regulations. For the applicability of the RFA, refer to the Special Analyses section in the preamble to the cross-referencing notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these temporary regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses.

C. Paperwork Reduction Act

As stated in the previously issued interim final regulations, this rule is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) because it does not contain a ''collection of information'' as defined in 44 U.S.C. 3502 (11).

V. Statutory Authority

The Department of the Treasury temporary regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor interim final regulations are adopted pursuant to the authority contained in 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185c, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L. 104–191, 110 Stat. 1936; sec. 401(b), Pub. L. 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029; Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

The Department of Health and Human Services interim final regulations are adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

List of Subjects

26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

45 CFR Part 147

Health care, Health insurance, Reporting and recordkeeping requirements, and State regulation of health insurance.

Department of the Treasury

Internal Revenue Service

26 CFR Chapter 1

Accordingly, 26 CFR part 54 is amended as follows:

PART 54—PENSION EXCISE TAXES

■ **Paragraph 1.** The authority citation for part 54 continues to read as follows:

Authority: 26 U.S.C. 7805. * * *

■ **Par. 2.** Section 54.9815–2713T is amended by revising paragraph (a)(1)(iv) to read as follows:

§ 54.9815–2713T Coverage of preventive health services (temporary).

(a) * * *

(1) * * *

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration and developed in accordance with 45 CFR 147.130(a)(1)(iv).

* * * * *

Department of Labor

Employee Benefits Security Administration

29 CFR Chapter XXV

29 CFR part 2590 is amended as follows:

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

■ 1. The authority citation for part 2590 continues to read as follows:

Authority: 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185c, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L. 104–191, 110 Stat. 1936; sec. 401(b), Pub. L. 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029; Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

Subpart C—Other Requirements

■ 2. Section 2590.715–2713 is amended by revising paragraph (a)(1)(iv) to read as follows:

§ 2590.715–2713 Coverage of preventive health services.

(a) * * *

(1) * * *

(iv) With respect to women, to the extent not described in paragraph

(a)(1)(i) of this section, preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration and developed in accordance with 45 CFR 147.130(a)(1)(iv).

* * * * *

Department of Health and Human Services

For the reasons stated in the preamble, the Department of Health and Human Services amends 45 CFR part 147 as follows:

PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

■ 1. The authority citation for part 147 continues to read as follows:

Authority: 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

■ 2. Section 147.130 is amended by revising paragraph (a)(1)(iv) to read as follows:

§ 147.130 Coverage of preventive health services.

(a) * * *

(1) * * *

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a ''religious employer'' is an organization that meets all of the following criteria:

(*1*) The inculcation of religious values is the purpose of the organization.

(*2*) The organization primarily employs persons who share the religious tenets of the organization.

(*3*) The organization serves primarily persons who share the religious tenets of the organization.

(*4*) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

* * * * *

Steven T. Miller,

Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Approved: July 28, 2011.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

Signed this 29th day of July 2011.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

OCIIO–9992–IFC2

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: July 28, 2011.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: July 28, 2011.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2011–19684 Filed 8–1–11; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0717]

RIN 1625–AA00

Safety Zone; Discovery World Private Wedding Firework Displays, Milwaukee, WI

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the waters of Milwaukee Harbor in Milwaukee, Wisconsin. This zone is intended to restrict vessels from a portion of Milwaukee Harbor during two separate firework displays on July 31, 2011 and August 26, 2011. This temporary safety zone is necessary to protect spectators and vessels from the hazards associated with these firework displays.

DATES: This rule is in the CFR on August 3, 2011 through 10:30 p.m. on August 26, 2011. This rule is effective with actual notice for purposes of enforcement at 9:30 p.m. on July 31, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0717 and are available online by going to *http://www.regulations.gov*, inserting USCG–2011–0717 in the Docket ID box, and then clicking ''search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, contact or e-mail BM1 Adam Kraft, U.S. Coast Guard Sector Lake Michigan, at 414–747–7148 or *Adam.D.Kraft@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

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

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

would be impracticable and contrary to the public interest.

Background and Purpose

The Discovery World Private Wedding fireworks are a City permitted fireworks display that will occur twice over Milwaukee's Harbor in Milwaukee, Wisconsin. The fireworks for these two events will be launched from 9:30 p.m. until 10:30 p.m. on both July 31, 2011 and August 26, 2011. The Captain of the Port, Sector Lake Michigan has determined that these firework displays present significant hazards to vessels and spectators in the vicinity of the launch site.

Discussion of Rule

Because of the aforesaid hazards, the Captain of the Port, Sector Lake Michigan has determined that a temporary safety zone is necessary to ensure the safety of spectators and vessels during the setup, loading, and launching of the fireworks display. Accordingly, this temporary safety zone will encompass all waters of Milwaukee Harbor in the vicinity of the Discovery World pier in Milwaukee Wisconsin within a 700 foot radius from the fireworks launch site located on a land in position 43°02′11″ N, 087°53′37″ W. (DATUM: NAD 83).

All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port, Sector Lake Michigan, or his or her designated representative. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port, Sector Lake Michigan, or his or her designated representative. The Captain of the Port, Sector Lake Michigan, or his or her designated representative may be contacted via VHF Channel 16.

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.

It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone will be relatively small in size and will exist for only one hour on two specific days. Thus, restrictions on vessel movement within the particular area are expected to be minimal. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule will 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.

This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in the affected portion of Milwaukee Harbor near Discovery World pier in Milwaukee Wisconsin, between 9:30 p.m. and 10:30 p.m. on both July 31, 2011 and August 26, 2011.

This temporary safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: During each of the two displays, the zone in this regulation will only be in effect for 60 minutes, and vessel traffic can safely pass outside the safety zone during the event. In the event that this temporary safety zone affects shipping, commercial vessels may request permission from the Captain of The Port, Sector Lake Michigan, to transit through the safety zone. The Coast Guard will give notice to the public via a Broadcast to Mariners that the regulation is in effect.

Assistance for Small Entities

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

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

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 or more in any one year. Though this rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not affect 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 does not concern an environmental risk to health or risk to safety that may 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 guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction because it involves the establishment of a temporary safety zone.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T09–0717 to read as follows:

§ 165.T09–0717 Safety Zone; Discovery World Private Party Fireworks Display, Milwaukee, Wisconsin.

(a) *Location.* The following area is a temporary safety zone: All waters of Milwaukee Harbor, in the vicinity of the Discovery World pier in Milwaukee Wisconsin, within a 700 foot radius from the fireworks launch site located on land in position 43°02′11″ N, 087°53′37″ W.

(b) *Effective and enforcement period.* This rule will be effective and enforced from 9:30 p.m. to 10:30 p.m. on both July 31, 2011 and again on August 26, 2011.

(c) *Regulations.*

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

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

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

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

(5) Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port, Sector Lake Michigan, or his or her designated representative.

Dated: July 21, 2011.

M.W. Sibley,

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

[FR Doc. 2011–19604 Filed 8–2–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1002

[Docket No. EP 542 (Sub–No. 19)]

Regulations Governing Fees for Services Performed in Connection With Licensing and Related Services—2011 Update

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Board adopts its 2011 User-Fee Update and revises its fee schedule to reflect a combination of increased and decreased costs, resulting from a freeze on wage and salary increases in 2011, coupled with changes to the Board's overhead & publication costs.

DATES: *Effective Date:* These rules are effective on September 2, 2011.

FOR FURTHER INFORMATION CONTACT: David T. Groves, (202) 245–0327, or Anne Quinlan, (202) 245–0309. TDD for the hearing impaired: 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Board's regulations at 49 CFR 1002.3 provide for annual update of the Board's entire User-Fee schedule. Fees are

generally revised based on the cost-study formula set forth at 49 CFR 1002.3(d). The fee changes adopted here reflect a combination of the unchanged wage and salary costs from the 2010 User Fee Update decision plus changes to the various Board overhead and publication costs (one increased and three decreased from their comparable 2010 levels), resulting from the mechanical application of the update formula in 49 CFR 1002.3(d). Results from the formula application indicate that justified fee amounts in this 2011 update decision either remain unchanged (113 fee or sub-fee items) or decreased (12 fee or sub-fee items) from their respective 2010 update levels. No new fees are proposed in this proceeding. Therefore, the Board finds that notice and comment are unnecessary for this proceeding. *See Regulations Governing Fees For Services—1990 Update*, 7 I.C.C.2d 3 (1990); *Regulations Governing Fees For Services—1991 Update,* 8 I.C.C.2d 13 (1991); and *Regulations Governing Fees For Services—1993 Update*, 9 I.C.C.2d 855 (1993).

The Board concludes that the fee changes adopted here will not have a significant economic impact on a substantial number of small entities because the Board's regulations provide for waiver of filing fees for those entities that can make the required showing of financial hardship.

Additional information is contained in the Board's decision. To obtain a free copy of the full decision, visit the Board's Web site at *http://www.stb.dot.gov* or call the Board's Information Officer at (202) 245–0245. Assistance for the hearing impaired is available through Federal Information Relay Services (FIRS): (800) 877–8339.

List of Subjects in 49 CFR Part 1002

Administrative practice and procedure, Common carriers, and Freedom of information.

Decided: July 27, 2011.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

Jeffrey Herzig,

Clearance Clerk.

Code of Federal Regulations

For the reasons set forth in the preamble, title 49, chapter X, part 1002, of the Code of Federal Regulations is amended as follows:

PART 1002—FEES

■ 1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A) and 553; 31 U.S.C. 9701 and 49 U.S.C. 721(a).

* * * * *

■ 2. In § 1002.2, paragraph (f) is revised as follows:

§ 1002.2 Filing fees.

* * * * *

(f) *Schedule of filing fees.*

Type of proceeding	Fee
PART I: Non-Rail Applications or Proceedings to Enter Upon a Particular Financial Transaction or Joint Arrangement:	
(1) An application for the pooling or division of traffic	$4,400.
(2)(i) An application involving the purchase, lease, consolidation, merger, or acquisition of control of a motor carrier of passengers under 49 U.S.C. 14303.	$2,000.
(ii) A petition for exemption under 49 U.S.C. 13541 (other than a rulemaking) filed by a non-rail carrier not otherwise covered.	$3,200.
(iii) A petition to revoke an exemption filed under 49 U.S.C. 13541(d)	$2,600.
(3) An application for approval of a non-rail rate association agreement. 49 U.S.C. 13703.	$27,500.
(4) An application for approval of an amendment to a non-rail rate association agreement:	
(i) Significant amendment	$4,600.
(ii) Minor amendment	$100.
(5) An application for temporary authority to operate a motor carrier of passengers. 49 U.S.C. 14303(i)	$500.
(6) A notice of exemption for transaction within a motor passenger corporate family that does not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with motor passenger carriers outside the corporate family.	$1,700.
(7)–(10) [Reserved].	
PART II: Rail Licensing Proceedings Other Than Abandonment or Discontinuance Proceedings:	
(11)(i) An application for a certificate authorizing the extension, acquisition, or operation of lines of railroad. 49 U.S.C. 10901.	$7,200.
(ii) Notice of exemption under 49 CFR 1150.31–1150.35	$1,800.
(iii) Petition for exemption under 49 U.S.C. 10502	$12,500.
(12)(i) An application involving the construction of a rail line	$74,500.
(ii) A notice of exemption involving construction of a rail line under 49 CFR 1150.36	$1,800.
(iii) A petition for exemption under 49 U.S.C. 10502 involving construction of a rail line	$74,500.
(iv) A request for determination of a dispute involving a rail construction that crosses the line of another carrier under 49 U.S.C. 10902(d).	$250.
(13) A Feeder Line Development Program application filed under 49 U.S.C. 10907(b)(1)(A)(i) or 10907(b)(1)(A)(ii).	$2,600.
(14)(i) An application of a class II or class III carrier to acquire an extended or additional rail line under 49 U.S.C. 10902.	$6,200.
(ii) Notice of exemption under 49 CFR 1150.41–1150.45	$1,800.
(iii) Petition for exemption under 49 U.S.C. 10502 relating to an exemption from the provisions of 49 U.S.C. 10902.	$6,600.
(15) A notice of a modified certificate of public convenience and necessity under 49 CFR 1150.21–1150.24	$1,600.
(16) An application for a land-use-exemption permit for a facility existing as of October 16, 2008 under 49 U.S.C. 10909.	$6,000.
(17) An application for a land-use-exemption permit for a facility not existing as of October 16, 2008 under 49 U.S.C. 10909.	$21,100.
(18)–(20) [Reserved].	
PART III: Rail Abandonment or Discontinuance of Transportation Services Proceedings:	
(21)(i) An application for authority to abandon all or a portion of a line of railroad or discontinue operation thereof filed by a railroad (except applications filed by Consolidated Rail Corporation pursuant to the Northeast Rail Service Act [Subtitle E of Title XI of Pub. L. 97–35], bankrupt railroads, or exempt abandonments).	$22,100.

Type of proceeding	Fee
(ii) Notice of an exempt abandonment or discontinuance under 49 CFR 1152.50	$3,600.
(iii) A petition for exemption under 49 U.S.C. 10502	$6,300.
(22) An application for authority to abandon all or a portion of a line of a railroad or operation thereof filed by Consolidated Rail Corporation pursuant to Northeast Rail Service Act.	$450.
(23) Abandonments filed by bankrupt railroads	$1,800.
(24) A request for waiver of filing requirements for abandonment application proceedings	$1,800.
(25) An offer of financial assistance under 49 U.S.C. 10904 relating to the purchase of or subsidy for a rail line proposed for abandonment.	$1,500.
(26) A request to set terms and conditions for the sale of or subsidy for a rail line proposed to be abandoned	$22,600.
(27)(i) A request for a trail use condition in an abandonment proceeding under 16 U.S.C.1247(d)	$250.
(ii) A request to extend the period to negotiate a trail use agreement	$450.
(28)–(35) [Reserved].	
PART IV: Rail Applications to Enter Upon a Particular Financial Transaction or Joint Arrangement:	
(36) An application for use of terminal facilities or other applications under 49 U.S.C. 11102	$18,900.
(37) An application for the pooling or division of traffic. 49 U.S.C. 11322	$10,200.
(38) An application for two or more carriers to consolidate or merge their properties or franchises (or a part thereof) into one corporation for ownership, management, and operation of the properties previously in separate ownership. 49 U.S.C. 11324:	
(i) Major transaction	$1,488,500.
(ii) Significant transaction	$297,700.
(iii) Minor transaction	$7,500.
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	$1,700.
(v) Responsive application	$7,500.
(vi) Petition for exemption under 49 U.S.C. 10502	$9,300.
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	$5,500.
(39) An application of a non-carrier to acquire control of two or more carriers through ownership of stock or otherwise. 49 U.S.C. 11324:	
(i) Major transaction	$1,488,500.
(ii) Significant transaction	$297,700.
(iii) Minor transaction	$7,500.
(iv) A notice of an exempt transaction under 49 CFR 1180.2(d)	$1,300.
(v) Responsive application	$7,500.
(vi) Petition for exemption under 49 U.S.C. 10502	$9,300.
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	$5,500.
(40) An application to acquire trackage rights over, joint ownership in, or joint use of any railroad lines owned and operated by any other carrier and terminals incidental thereto. 49 U.S.C. 11324:	
(i) Major transaction	$1,488,500.
(ii) Significant transaction	$297,700.
(iii) Minor transaction	$7,500.
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	$1,100.
(v) Responsive application	$7,500.
(vi) Petition for exemption under 49 U.S.C. 10502	$9,300.
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	$5,500.
(41) An application of a carrier or carriers to purchase, lease, or contract to operate the properties of another, or to acquire control of another by purchase of stock or otherwise. 49 U.S.C. 11324:	
(i) Major transaction	$1,488,500.
(ii) Significant transaction	$297,700.
(iii) Minor transaction	$7,500.
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	$1,400.
(v) Responsive application	$7,500.
(vi) Petition for exemption under 49 U.S.C. 10502	$6,600.
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	$5,500.
(42) Notice of a joint project involving relocation of a rail line under 49 CFR 1180.2(d)(5)	$2,400.
(43) An application for approval of a rail rate association agreement. 49 U.S.C. 10706	$69,700.
(44) An application for approval of an amendment to a rail rate association agreement. 49 U.S.C. 10706:.	
(i) Significant amendment	$12,900.
(ii) Minor amendment	$100.
(45) An application for authority to hold a position as officer or director under 49 U.S.C. 11328	$750.
(46) A petition for exemption under 49 U.S.C. 10502 (other than a rulemaking) filed by rail carrier not otherwise covered.	$8,000.
(47) National Railroad Passenger Corporation (Amtrak) conveyance proceeding under 45 U.S.C. 562	$250.
(48) National Railroad Passenger Corporation (Amtrak) compensation proceeding under Section 402(a) of the Rail Passenger Service Act.	$250.
(49)–(55) [Reserved].	
PART V: Formal Proceedings:	
(56) A formal complaint alleging unlawful rates or practices of carriers:	
(i) A formal complaint filed under the coal rate guidelines (Stand-Alone Cost Methodology) alleging unlawful rates and/or practices of rail carriers under 49 U.S.C. 10704(c)(1).	$350.
(ii) A formal complaint involving rail maximum rates filed under the Simplified-SAC methodology.	$350.
(iii) A formal complaint involving rail maximum rates filed under the Three Benchmark methodology	$150.

Type of proceeding	Fee
(iv) All other formal complaints (except competitive access complaints)	$350.
(v) Competitive access complaints	$150.
(vi) A request for an order compelling a rail carrier to establish a common carrier rate	$250.
(57) A complaint seeking or a petition requesting institution of an investigation seeking the prescription or division of joint rates or charges. 49 U.S.C. 10705.	$8,800.
(58) A petition for declaratory order:	
(i) A petition for declaratory order involving a dispute over an existing rate or practice which is comparable to a complaint proceeding.	$1,000.
(ii) All other petitions for declaratory order	$1,400.
(59) An application for shipper antitrust immunity. 49 U.S.C. 10706(a)(5)(A)	$7,000.
(60) Labor arbitration proceedings	$250.
(61)(i) An appeal of a Surface Transportation Board decision on the merits or petition to revoke an exemption pursuant to 49 U.S.C. 10502(d).	$250.
(ii) An appeal of a Surface Transportation Board decision on procedural matters except discovery rulings	$350.
(62) Motor carrier undercharge proceedings	$250.
(63)(i) Expedited relief for service inadequacies: A request for expedited relief under 49 U.S.C. 11123 and 49 CFR part 1146 for service emergency.	$250.
(ii) Expedited relief for service inadequacies: A request for temporary relief under 49 U.S.C. 10705 and 11102, and 49 CFR part 1147 for service inadequacy.	$250.
(64) A request for waiver or clarification of regulations except one filed in an abandonment or discontinuance proceeding, or in a major financial proceeding as defined at 49 CFR 1180.2(a).	$550.
(65)–(75) [Reserved].	
PART VI: Informal Proceedings:	
(76) An application for authority to establish released value rates or ratings for motor carriers and freight forwarders of household goods under 49 U.S.C. 14706.	$1,200.
(77) An application for special permission for short notice or the waiver of other tariff publishing requirements	$100.
(78) The filing of tariffs, including supplements, or contract summaries	$1 per page. ($24 minimum charge).
(79) Special docket applications from rail and water carriers:	
(i) Applications involving $25,000 or less	$75.
(ii) Applications involving over $25,000	$150.
(80) Informal complaint about rail rate applications	$600.
(81) Tariff reconciliation petitions from motor common carriers:	
(i) Petitions involving $25,000 or less	$75.
(ii) Petitions involving over $25,000	$150.
(82) Request for a determination of the applicability or reasonableness of motor carrier rates under 49 U.S.C. 13710(a)(2) and (3).	$200.
(83) Filing of documents for recordation. 49 U.S.C. 11301 and 49 CFR 1177.3(c).	$41 per document.
(84) Informal opinions about rate applications (all modes)	$250.
(85) A railroad accounting interpretation	$1,100.
(86)(i) A request for an informal opinion not otherwise covered	$1,400.
(ii) A proposal to use on a voting trust agreement pursuant to 49 CFR 1013 and 49 CFR 1180.4(b)(4)(iv) in connection with a major control proceeding as defined at 49 CFR 1180.2(a).	$5,100.
(iii) A request for an informal opinion on a voting trust agreement pursuant to 49 CFR 1013.3(a) not otherwise covered.	$500.
(87) Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board under 49 CFR 1108:	
(i) Complaint	$75.
(ii) Answer (per defendant), Unless Declining to Submit to Any Arbitration	$75.
(iii) Third Party Complaint	$75.
(iv) Third Party Answer (per defendant), Unless Declining to Submit to Any Arbitration	$75.
(v) Appeals of Arbitration Decisions or Petitions to Modify or Vacate an Arbitration Award	$150.
(88) Basic fee for STB adjudicatory services not otherwise covered	$250.
(89)–(95) [Reserved].	
PART VII: Services:	
(96) Messenger delivery of decision to a railroad carrier's Washington, DC agent	$32 per delivery.
(97) Request for service or pleading list for proceedings	$24 per list.
(98) Processing the paperwork related to a request for the Carload Waybill Sample to be used in a Surface Transportation Board or State proceeding that:	
(i) Does not require a **Federal Register** notice:	
(A) Set cost portion	$150.
(B) Sliding cost portion	$47 per party.
(ii) Does require a **Federal Register** notice:	
(A) Set cost portion	$400.
(B) Sliding cost portion	$47 per party.
(99)(i) Application fee for the Surface Transportation Board's Practitioners' Exam	$150.
(ii) Practitioners' Exam Information Package	$25.
(100) Carload Waybill Sample data:	
(i) Requests for Public Use File for all years prior to the most current year Carload Waybill Sample data available, provided on CD–R.	$250 per year.
(ii) Specialized programming for Waybill requests to the Board	$112 per hour.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2010–0059; 92220–1113–0000–C6]

RIN 1018–AW26

Endangered and Threatened Wildlife and Plants; Removal of Echinacea tennesseensis (Tennessee Purple Coneflower) From the Federal List of Endangered and Threatened Plants

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule; availability of final post-delisting monitoring plan.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service or USFWS), are removing the plant *Echinacea tennesseensis* (commonly referred to as Tennessee purple coneflower) from the List of Endangered and Threatened Plants. This action is based on a thorough review of the best scientific and commercial data available, which indicate that this species has recovered and no longer meets the definition of threatened or endangered under the Endangered Species Act of 1973, as amended (Act). Our review of the status of this species shows that populations are stable, threats are addressed, and adequate regulatory mechanisms are in place so that the species is not currently, and is not likely to again become, an endangered species within the foreseeable future in all or a significant portion of its range. Finally, we announce the availability of the final post-delisting monitoring plan for *E. tennesseensis.*

DATES: This rule is effective on September 2, 2011.

ADDRESSES: Copies of the post-delisting monitoring plan are available by request from the Tennessee Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**) or online at: *http://www.fws.gov/cookeville/* and *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mary E. Jennings, Field Supervisor, U.S. Fish and Wildlife Service, Tennessee Ecological Services Field Office, 446 Neal Street, Cookeville, TN 38501 (telephone 931/528–6481; facsimile 931/528–7075). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800/877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Previous Federal Actions

Section 12 of the Act (16 U.S.C. 1531 *et seq.*) directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct. On July 1, 1975, the Service published a notice in the **Federal Register** (40 FR 27824) accepting the Smithsonian report as a petition to list taxa named therein under section 4(c)(2) [now 4(b)(3)] of the Act and announced our intention to review the status of those plants. *Echinacea tennesseensis* was included in that report (40 FR 27873). Tennessee purple coneflower is the common name for *E. tennesseensis;* however, we will primarily use the scientific name of this species throughout this final rule.

On June 16, 1976, we published a proposed rule in the **Federal Register** (41 FR 24524) to designate approximately 1,700 vascular plant species, including *Echinacea tennesseensis,* as endangered under section 4 of the Act. On June 6, 1979, we published a final rule in the **Federal Register** (44 FR 32604) designating *E. tennesseensis* as endangered. The final rule identified the following threats to *E. tennesseensis:* Loss of habitat due to residential and recreational development; collection of the species for commercial or recreational purposes; grazing; no State law protecting rare plants in Tennessee; and succession of cedar glade communities in which *E. tennesseensis* occurred.

On February 14, 1983, we published the Tennessee Coneflower Recovery Plan (Service 1983, 41 pp.), a revision of which we published on November 14, 1989 (Service 1989, 30 pp.). On September 21, 2007, we initiated a 5-year status review of this species (72 FR 54057). On August 12, 2010, we published a proposed rule to remove *Echinacea tennesseensis* from the List of Endangered and Threatened Plants, provided notice of the availability of a post-delisting monitoring plan, and opened a 60-day public comment period (75 FR 48896).

Species Information

A member of the sunflower family (Asteraceae), *Echinacea tennesseensis* is a perennial herb with a long, fusiform (*i.e.,* thickened toward the middle and tapered towards either end), blackened root. In late summer, the species bears showy purple flower heads on one-to-many hairy branches. Linear to lance-shaped leaves up to 20 centimeters (cm; 8 inches (in.)) long and 1.5 cm (0.6 in.) wide arise from the base of *E. tennesseensis* and are beset with coarse hairs, especially along the margins. The ray flowers (*i.e.,* petals surrounding the darker purple flowers of the central disc) are pink to purple and spread horizontally or arch slightly forward from the disc to a length of 2–4 cm (0.8–1.8 in.).

The following description of this species' life history is summarized from Hemmerly (1986, pp. 193–195): Seeds are shed from plants during fall and winter and begin germinating in early March of the following year, producing numerous seedlings by late March. Most of the seedling growth occurs during the first 6 or 7 weeks of the first year, during which plants will grow to a height of 2–3 cm (0.8–1.2 in) or less. Plants remain in a rosette stage and root length increases rapidly during these weeks. Plants can reach sexual maturity by the middle of their second growing season and only small losses in seed viability have been observed after a period of 5 years in dry storage (Hemmerly 1976, p. 17). However, Baskin and Baskin (1989, p. 66) suggest that *Echinacea tennesseensis* might not form persistent seed banks, based on results of field germination trials. Individuals of *E. tennesseensis* can live up to at least 6 years, but the maximum lifespan is probably much longer (Baskauf 1993, p. 37).

Echinacea tennesseensis was first collected in 1878 in Rutherford County, Tennessee, by Dr. A. Gattinger and later described by Beadle (1898, p. 359) as *Brauneria tennesseensis* on the basis of specimens collected by H. Eggert in 1897 from ''a dry, gravelly hill'' near the town of LaVergne. Fernald (1900, pp. 86–87) did not accept Beadle's identification of *B. tennesseensis* as a distinct species, instead he merged it with the more widespread *E. angustifolia.* This treatment was upheld by many taxonomists until McGregor (1968, pp. 139–141) classified the taxon as *E. tennesseensis* (Beadle) Small, based on examination of materials from collections discussed above and from collections by R. McVaugh in 1936. As McGregor (1968, p. 141) was unable to locate any plants while conducting searches during the months of June through August, 1959–1961, he concluded that the species was very rare or possibly extinct in his monograph of the genus *Echinacea.* The species went unnoticed until its rediscovery in a cedar glade in Davidson County as reported by Baskin *et al.* (1968, p. 70), and subsequently in Wilson County by Quarterman and Hemmerly (1971, pp. 304–305), who also noted that the area

believed to be the type locality for the species was destroyed by the construction of a trailer park.

More recently, Binns *et al.* (2002, pp. 610–632) revised the taxonomy of the genus *Echinacea* and in doing so reduced *Echinacea tennesseensis* to one of five varieties of *E. pallida.* Their taxonomic treatment considers *E. pallida* var. *tennesseensis* (Beadle) Small to be a synonym of their *E. tennesseensis* (Beadle) Binns, B. R. Baum, & Arnason, comb. nov. (Binns *et al.* 2002, pp. 629). However, this has not been unanimously accepted among plant taxonomists (Estes 2008, pers. comm.; Weakley 2008, pp. 139–140). Kim *et al.* (2004) examined the genetic diversity of *Echinacea* species and their results conflicted with the division of the genus by Binns *et al.* (2002, pp. 617–632) into two subgenera, *Echinacea* and *Pallida,* one of which—*Echinacea*—included only *E. purpurea.* Mechanda *et al.* (2004, p. 481) concluded that their analysis of genetic diversity within *Echinacea* only supported recognition of one of the five varieties of *E. pallida* that Binns *et al.* (2002, pp. 626–629) described, namely *E. pallida* var. *tennesseensis.* While Mechanda *et al.* (2004, p. 481) would also reduce *E. tennesseensis* from specific to varietal status, the conflicting results between these two investigations point to a lack of consensus regarding the appropriate taxonomic rank of taxa within the genus *Echinacea.* Because clear acceptance of the taxonomic revision by Binns *et al.* (2002, pp. 610–632) is lacking, and Flora of North America (*http://www.efloras.org/florataxon.aspx?flora_id=1&taxon_id=250066491,* accessed December 3, 2009) and a flora under development by Weakley (2008, pp. 139–140) both retain specific status for *E. tennesseensis,* we continue to recognize *E. tennesseensis* as a species for the purposes of this rule.

Echinacea tennesseensis is restricted to limestone barrens and cedar glades of the Central Basin, Interior Low Plateau Physiographic Province, in Davidson, Rutherford, and Wilson Counties in Tennessee (Tennessee Department of Environment and Conservation (TDEC) 2006, p. 2). These middle Tennessee habitats typically occur on thin plates of Lebanon limestone that are more or less horizontally bedded, though interrupted by vertical fissures in which sinkholes may be readily formed (Quarterman 1986, p. 124). Somers *et al.* (1986, pp. 180–189) described seven plant community types from their study of 10 cedar glades in middle Tennessee. They divided those communities into xeric (dry) communities, which occurred in locations with no soil or soil depth less than 5 cm (2 in.), and subxeric (moderately dry) communities that occurred on soils deeper than 5 cm (2 in.) (Somers *et al.* 1986, p. 186). Quarterman (1986, p. 124) noted that soil depths greater than 20 cm (8 in.) in the vicinity of cedar glades tend to support plant communities dominated by eastern red cedar (*Juniperus virginiana*) and other woody species. Somers *et al.* (1986, p. 191) found *E. tennesseensis* in four of the community types they classified, but could not determine the fidelity of the species to a particular community type because it only occurred on three of the glades they studied and was infrequently encountered in plots within those sites. The communities where *E. tennesseensis* occurred spanned two xeric and two subxeric types. The xeric community types, named for the dominant species that either alone or combined constituted greater than 50 percent cover, were the (1) *Nostoc commune* (blue-green algae)—*Sporobolus vaginiflorus* (poverty dropseed) and (2) *Dalea gattingeri* (purpletassels) communities. The subxeric types were the (1) *S. vaginiflorus* and (2) *Pleurochaete squarrosa* (square pleurochaete moss) communities. Mean soil depths across these communities ranged from 4.1 to 7.7 cm (1.6 to 3.0 in.) (Somers *et al.* 1986, pp. 186–188).

When *Echinacea tennesseensis* was listed as endangered in 1979 (44 FR 32604), it was known only from three locations, one each in Davidson, Rutherford, and Wilson Counties. When the species' recovery plan was completed in 1989, there were five extant populations ranging in size from approximately 3,700 to 89,000 plants and consisting of one to three colonies each (Clebsch 1988, p. 14; Service 1989, p. 2). The recovery plan defined a population as a group of colonies in which the probability of gene exchange through cross pollination is high, and a colony was defined as all *E. tennesseensis* plants found at a single site that are separated from other plants within the population by unsuitable habitat (Service 1989, p. 1). While analysis of genetic variability within *E. tennesseensis* did not reveal high levels of differentiation among these populations (Baskauf *et al.* 1994, p. 186), recovery efforts have been implemented and tracked with respect to these geographically defined populations. The geographic distribution of these populations and the colonies they are comprised of was updated in a status survey of *E. tennesseensis* by TDEC (1996, Appendix I) to include all known colonies at that time, including those from a sixth population introduced into glades at the Stones River National Battlefield. For the purposes of this rule, we have followed these population delineations and have assigned most colonies that have been discovered since the status survey was completed to the geographically closest population.

The six *Echinacea tennesseensis* populations occur within an approximately 400 square kilometer (km^2; 154 square miles (mi^2)) area and include between 2 and 11 colonies each. In 2005, TDEC and the Service confirmed the presence of *E. tennesseensis* at 36 colonies and counted the number of flowering stems in each (TDEC 2006, pp. 4–5). Fifteen of these are natural colonies, and 21 of the 36 colonies have been established through introductions for the purpose of recovering *E. tennesseensis* (TDEC 1991, pp. 3–7; TDEC 1996, Appendix I; Lincicome 2008, pers. comm.). Three of these introduced colonies constitute the sixth population that was established at a Designated State Natural Area (DSNA) in the Stones River National Battlefield in Rutherford County (TDEC 1996, Appendix I). We do not consider 2 of the 21 introduced colonies as contributing to recovery and do not include them in our analysis of the current status of *E. tennesseensis* for reasons explained in the Recovery section of this rule. An additional introduced colony that was not monitored during 2005, but for which TDEC maintains an element occurrence record, brings the number of introduced colonies we consider here to 20 and the total number of colonies considered for this rulemaking to 35.

In assessing the status of *Echinacea tennesseensis* for this final rule, with respect to the recovery criterion described below, we use data from flowering stem counts conducted by the Service and TDEC (2006, pp. 4–5) in 2005 (Table 1), qualitative data collected at various times since the initial discovery of each colony (TDEC 1996, Appendix I), and quantitative monitoring data from nine natural colonies and five introduced colonies (Tables 2 and 3) (Drew 1991, p. 54; Clebsch 1993, pp. 11–16; Drew and Clebsch 1995, pp. 62–67; TDEC unpublished data). In order to address comments we received in response to the proposed delisting rule, the Service and TDEC undertook a thorough review of the monitoring data collected by TDEC and reanalyzed those data to produce ratios among juvenile and adult stage-classes (Table 2) and to produce density estimates with confidence

intervals for each monitored site (Table 3).

Table 1 in the proposed rule to delist *Echinacea tennesseensis* (75 FR 48896, August 12, 2010) provided estimates of the numbers of individuals in each colony, which were produced based on relationships reported by TDEC (2006, p. 2) between numbers of flowering stems and other demographic classes. Table 1 is revised in this final rule to report only the numbers of flowering stems that were counted at each natural and introduced colony during 2005. We removed the estimates of numbers of adults and total numbers of plants that appeared in the proposed rule because those estimates were based on ratios among stage classes that were calculated using data from a single year, in which the ratio of other stage classes to adults was the highest observed during any year of monitoring for *E. tennesseensis,* and those data were only from naturally occurring colonies.

TABLE 1—SUMMARY OF TENNESSEE PURPLE CONEFLOWER POPULATIONS AND COLONIES. INCLUDES DATA ON ORIGIN, WHETHER COLONIES ARE SECURE OR SELF-SUSTAINING, AND FLOWERING STEM COUNTS FROM 2005 SURVEYS

[* = Colonies selected for post-delisting monitoring.]

Population	Population name	Colony No.	EO No.	Ownership	Origin	Year First observed	Secure Y/N	Self-Sustaining Y/N	Flowering stems
1	Mount View	1.1	001	TDEC–DNA[a].	Natural	1963	Y	Y	5,430
		1.2	022	COE[b]	Introduced.	1990	Y	Y	252
		1.4	031	COE	Introduced.	1989	Y	Y	596
Totals									6,278
2	Vesta	2.1	011	Private	Natural	1970	N	Y	2,820
		*2.1	006	TDEC–DNA	Natural	1988	Y	Y	4,970
		2.2	002	TDEC–DNA	Natural	1980	Y	Y	4,274
		2.3	038	TDF[c] (DSNA[d]).	Introduced.	1983	Y	Y	139
		2.4	039	TDF (DSNA).	Introduced.	1983	N	N	1
		*2.6	040	TDEC–SP	Introduced.	1982	N	Y	252
		2.7	048	TDF (DSNA).	Introduced.	2003	N	N	6
		2.8	050	TDEC–DNA	Natural	2003	Y	Y	2,143
		+2.9	053	Private	Introduced.	2006	N	Y	n/a
Totals									14,605
3	Vine	*3.1	005	TDF (DSNA)/private.	Natural	1979	Y	Y	7,555
		*3.2	016	TDEC–DNA	Natural	1989	Y	Y	12,457
		3.2	015	Private	Natural	1989	N	Y	432
		3.2	012	Private	Natural	1989	N	Y	610
		*3.2	017	TDEC–DNA	Natural	1989	Y	Y	12,457
		3.3	014	Private	Natural	1989	N	N	11
		*3.4	021	Private (DSNA).	Natural	1990	Y	Y	12,979
		3.5	013	Private	Natural	1989	N	Y	2,529
		3.6	018	Private	Natural	1989	N	Y	157
		3.7	007	Private	Introduced.	1979	N	Y	1,705
		*3.8	030	TDF	Introduced.	1990	N	Y	1,863
		3.9	036	TDF	Introduced.	1989	Y	Y	2,744
		3.10	033	Private	Natural	1999	N	Y	5,374
		3.11	041	Private	Natural	1998	N	Y	1,935
								Totals	62,808
4	Allvan	*4.2	027	COE (DSNA).	Introduced.	1989	Y	Y	6,183
		*4.3	047	COE	Introduced.	1989	N	Y	385
									6,568
5	Couchville	*5.1	010	TDEC–DNA	Natural	1984	Y	Y	7,353
		5.2	020	Private	Natural	1990	N	Y	392
		5.3	024	TDEC–SP	Introduced.	1985	N	Y	1,607
		5.4	035	TDEC–SP	Introduced.	1991	Y	Y	863
		5.4	026	TDEC–SP	Introduced.	1989	Y	Y	987
		*5.5	025	TDEC–SP	Introduced.	1987	N	Y	1,300

TABLE 1—SUMMARY OF TENNESSEE PURPLE CONEFLOWER POPULATIONS AND COLONIES. INCLUDES DATA ON ORIGIN, WHETHER COLONIES ARE SECURE OR SELF-SUSTAINING, AND FLOWERING STEM COUNTS FROM 2005 SURVEYS—Continued

[* = Colonies selected for post-delisting monitoring.]

Population	Population name	Colony No.	EO No.	Ownership	Origin	Year First observed	Secure Y/N	Self-Sustaining Y/N	Flowering stems
		5.6	032	TDEC–SP	Introduced.	1989	Y	Y	846
		5.7	008	TDEC–SP	Natural ...	1981	N	N	17
		5.8	049	COE (DSNA).	Introduced.	2000	Y	Y	101
Totals	.....	.....	.....	.....	.....	.....	.....	.....	13,466
6	Stones River National Battlefield.	*6.1	009	NPS [e] (DSNA).	Introduced.	1970	Y	Y	2,535
		6.2	028	NPS (DSNA).	Introduced.	1995	Y	Y	237
		6.3	029	NPS (DSNA).	Introduced.	1991	Y	Y	852
Totals	.....	.....	.....	.....	.....	.....	.....	Totals	3,624
Grand Totals.	.....	.....	.....	.....	.....	.....	.....	.....	107,349

[a] Tennessee Department of Environment and Conservation—Division of Natural Areas Designated State Natural Areas (DSNA).
[b] U.S. Army Corps of Engineers.
[c] Tennessee Division of Forestry.
[d] DSNA that are not owned by TDEC–DNA.
[e] National Park Service.
[+] Colony 2.9 was not monitored during 2005, because it was not reported to TDEC–DNA until 2006, at which time there were thousands of plants (Lincicome 2006, pers. comm).

TABLE 2—RATIO OF JUVENILES TO ADULT DETERMINED FROM STAGE-SPECIFIC COUNT DATA ACQUIRED DURING SAMPLING BY DREW (1991, P. 54) FOR 1987, CLEBSCH (1993, P. 11) FOR 1992, AND TDEC (UNPUBLISHED)

[* Colony 4.1 was destroyed circa 2004–2005.]

Origin	Colony No.	EO No.(s)	1987	1992	1998	2000	2001	2004	2006	2008	Colony mean
Natural	1.1	1	1.58	.....	1.78	.....	2.47	10.37	.....	1.06	3.45
	1.2	22	.....	2.76	.....	.....	.....	.....	.....	.....	n/a
	2.1	6	3.45	.....	0.94	2.60	1.67	9.43	.....	1.16	3.21
	3.1	5	2.49	.....	2.01	.....	2.78	14.52	.....	0.91	4.54
	3.2	12, 15–17	.....	1.94	.....	.....	.....	.....	.....	.....	n/a
	3.4	21	.....	2.00	.....	.....	.....	10.96	.....	1.38	4.78
	3.5	13	.....	1.88	.....	.....	.....	.....	.....	.....	n/a
	4.1*	3	2.21	.....	1.82	.....	2.03	12.03	.....	.....	4.52
	5.1	10	4.77	.....	5.19	2.64	1.42	8.27	.....	0.92	3.87
Introduced	3.8	30	.....	.....	.....	.....	.....	.....	6.17	.....	n/a
	4.2	27	.....	.....	.....	.....	.....	.....	4.78	.....	n/a
	4.3	47	.....	.....	.....	.....	.....	.....	11.95	.....	n/a
	5.5	25	.....	.....	.....	.....	.....	.....	4.12	.....	n/a
	6.1	9	.....	.....	.....	.....	.....	.....	5.18	.....	n/a
	Annual mean		2.90	2.15	2.35	2.62	2.07	10.93	6.44	1.08	.....

TABLE 3—ESTIMATED MEAN DENSITY PER SQUARE METER OF ECHINACEA TENNESSEENSIS AND 95% CONFIDENCE INTERVAL. DATA SOURCES INCLUDE DREW AND CLEBSCH (1995, P. 62) FOR 1987 AND TDEC (UNPUBLISHED).

[* Colony 4.1 was destroyed circa 2004–2005.]

Origin	Colony No.	EO No.	1987	1998		2000		2001		2004		2006		2008	
			Mean	Mean	95% CI	Mean	95% CI	Mean	95% CI	Mean	95% CI	Mean	95% CI	Mean	95% CI
Natural	1.1	1	12.90	41.63	42.25			25.56	20.57	44.03	37.33	.....	.....	9.71	8.02
	2.1	6	13.10	30.59	12.01	21.33	8.95	16.38	6.70	48.45	16.59	.....	.....	13.83	3.40
	3.1	5	20.70	58.20	23.84			51.77	29.82	92.45	30.73	.....	.....	18.79	7.27
	3.4	21								65.33	41.07	.....	.....	20.93	12.47
	*4.1	3	6.20	25.50	63.35			14.13	21.98	15.36	24.37	.....	.....	.....	.....
	5.1	10	6.20	27.75	11.84	7.82	3.78	8.56	3.10	15.03	6.16	.....	.....	4.76	1.79
Introduced	3.8	30	.....	.....	.....	.....	.....	.....	.....	.....	.....	3.15	6.24	.....	.....
	4.2	27	.....	.....	.....	.....	.....	.....	.....	.....	.....	11.60	12.98	.....	.....
	4.3	47	.....	.....	.....	.....	.....	.....	.....	.....	.....	19.50	34.91	.....	.....
	5.5	25	.....	.....	.....	.....	.....	.....	.....	.....	.....	12.03	8.96	.....	.....

TABLE 3—ESTIMATED MEAN DENSITY PER SQUARE METER OF *Echinacea tennesseensis* AND 95% CONFIDENCE INTERVAL. DATA SOURCES INCLUDE DREW AND CLEBSCH (1995, P. 62) FOR 1987 AND TDEC (UNPUBLISHED).—Continued

[* Colony 4.1 was destroyed circa 2004–2005.]

Origin	Colony No.	EO No.	1987	1998		2000		2001		2004		2006		2008	
			Mean	Mean	95% CI	Mean	95% CI	Mean	95% CI	Mean	95% CI	Mean	95% CI	Mean	95% CI
	6.1	9	.....	.....	.....	.....	.....	.....	.....	.....	.....	41.37	47.09	.....	.....

Natural colonies, or those not known to have been established through introductions, included 83,895 flowering stems in 2005 (TDEC 2006, p. 6). Introduced colonies, excluding the two mentioned above, accounted for 23,454 flowering stems (TDEC 2006, p. 6). Natural colonies constituted approximately 78 percent of the total flowering stems and introduced colonies approximately 22 percent. In this rule, we use the colony numbers reported by TDEC (1996, Appendix I) and have sequentially assigned additional colony numbers to those which have been discovered since that report was issued. In some instances, there are gaps evident in the sequence of colony numbers discussed, representing colonies that have been documented in the past but were either extirpated or of unknown status at the time of this rule.

Recovery

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. The Act directs that, to the maximum extent practicable, we incorporate into each plan:

(1) Site-specific management actions that may be necessary to achieve the plan's goals for conservation and survival of the species;

(2) Objective, measurable criteria, which when met would result in a determination, in accordance with the provisions of section 4 of the Act, that the species be removed from the list; and

(3) Estimates of the time required and cost to carry out the plan.

However, revisions to the list (adding, removing, or reclassifying a species) must reflect determinations made in accordance with sections 4(a)(1) and 4(b) of the Act. Section 4(a)(1) requires that the Secretary determine whether a species is endangered or threatened (or not) because of one or more of five threat factors. Therefore, recovery criteria must indicate when a species is no longer endangered or threatened by any of the five factors. In other words, objective, measurable criteria, or recovery criteria contained in recovery plans, must indicate when we would anticipate an analysis of the five threat factors under section 4(a)(1) would result in a determination that a species is no longer endangered or threatened. Section 4(b) of the Act requires that the determination be made ''solely on the basis of the best scientific and commercial data available.''

Thus, while recovery plans are intended to provide guidance to the Service, States, and other partners on methods of minimizing threats to listed species and on criteria that may be used to determine when recovery is achieved, they are not regulatory documents and cannot substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. Determinations to remove a species from the list made under section 4(a)(1) of the Act must be based on the best scientific and commercial data available at the time of the determination, regardless of whether that information differs from the recovery plan.

In the course of implementing conservation actions for a species, new information is often gained that requires recovery efforts to be modified accordingly. There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria being fully met. For example, one or more recovery criteria may have been exceeded while other criteria may not have been accomplished, yet the Service may judge that, overall, the threats have been minimized sufficiently, and the species is robust enough, that the Service may reclassify the species from endangered to threatened or perhaps delist the species. In other cases, recovery opportunities may have been recognized that were not known at the time the recovery plan was finalized. These opportunities may be used instead of methods identified in the recovery plan.

Likewise, information on the species may be learned that was not known at the time the recovery plan was finalized. The new information may change the extent that criteria need to be met for recognizing recovery of the species. Overall, recovery of species is a dynamic process requiring adaptive management, planning, implementing, and evaluating the degree of recovery of a species that may, or may not, fully follow the guidance provided in a recovery plan.

Thus, while the recovery plan provides important guidance on the direction and strategy for recovery, and indicates when a rulemaking process may be initiated, the determination to remove a species from the Federal List of Endangered and Threatened Wildlife is ultimately based on an analysis of whether a species is no longer endangered or threatened. The following discussion provides a brief review of recovery planning for *Echinacea tennesseensis* as well as an analysis of the recovery criteria and goals as they relate to evaluating the status of the species.

We first approved the Tennessee Coneflower Recovery Plan on February 14, 1983 (Service 1983, 41 pp.) and revised it on November 14, 1989 (Service 1989, 30 pp.). The recovery plan includes one delisting criterion: *Echinacea tennesseensis* will be considered recovered when there are at least five secure wild populations, each with three self-sustaining colonies of at least a minimal size. A colony will be considered self-sustaining when there are two juvenile plants for every flowering one. Minimal size for each colony is 15 percent cover of flowers over 669 square meters (m^2; 800 square yards (yd^2); 7,200 square feet (ft^2)) of suitable habitat. Establishing multiple populations during the recovery of endangered species serves two important functions:

(1) Providing redundancy on the landscape to minimize the probability that localized stochastic disturbances will threaten the entire species, and

(2) Preserving the genetic structure found within a species by maintaining the natural distribution of genetic variation among its populations.

In the case of *Echinacea tennesseensis,* the need for multiple distinct populations to maintain genetic structure is diminished, as Baskauf *et al.* (1994, p. 186) determined that the majority of genetic variability within this species is maintained within each

population rather than distributed among them. These data were not available at the time the recovery plan was completed. With respect to redundancy, the current number of *E. tennesseensis* colonies exceeds the total number recommended by the recovery plan for delisting this species, and we believe the current distribution of secured colonies among geographically distinct populations, which are separated by distances of 1.8 to 9 miles (2.9–14.5 km), is adequate for minimizing the likelihood that isolated stochastic disturbances would threaten species.

The criterion in the recovery plan for delisting *Echinacea tennesseensis* has been met, as described below. Additionally, the level of protection currently afforded to the species and its habitat, as well as the current status of threats, are outlined below in the Summary of Factors Affecting the Species section.

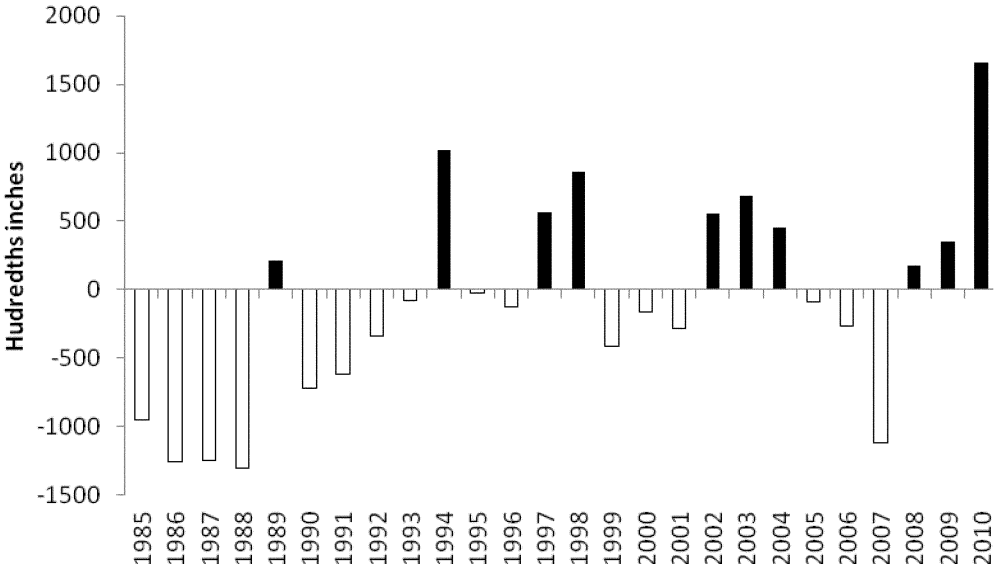
There currently are six geographically defined *Echinacea tennesseensis* populations, including the five described in the recovery plan (Service 1989, pp. 3–7) and one introduced population at the Stones River National Battlefield (TDEC 1996, Appendix I). Within these populations, there currently are 19 colonies of *E. tennesseensis* that occur entirely or mostly on protected lands, with five of the populations containing three or more colonies each. The Allvan population is the lone exception, as only one of its two colonies is secure at this time. The 19 secured colonies accounted for 88,773 flowering stems in 2005, or approximately 83 percent of the flowering stems observed; whereas, colonies that we do not consider secure accounted for 18,576 flowering stems, or approximately 17 percent of the flowering stems observed (TDEC 2006, pp. 4–5).

While data on numbers of juvenile plants have not been collected from all colonies, monitoring data that have been collected for this demographic attribute (see Table 2 above) have typically exceeded the value used in defining self-sustaining in the recovery plan—*i.e.,* that there be two juvenile plants for every flowering adult in a colony. The mean ratio of juvenile to adult plants in natural colonies, for a given year of monitoring, has ranged from 1.08 to 10.93, based on data collected at two to six sites per year in 1998, 2000, 2001, 2004, and 2008 (see Table 2 above). The mean of this ratio for each of these natural colonies across all years exceeds the ratio of two juveniles per adult. Ratios of juvenile to flowering adult plants in introduced colonies were first estimated during 2006, when the mean was found to be 6.44 juveniles per adult from a single year of data collected at six introduced colonies and the ratio for each of these colonies was greater than 4 juveniles per adult (see Table 2 above). Based on these data, we believe that those colonies for which ratios of juvenile to adult stage-classes are available meet the required ratio of two juveniles per adult that the recovery plan uses in defining self-sustaining. We believe that these data are representative of the status of *Echinacea tennesseensis* generally given the distribution of monitored colonies among each of the six populations used for tracking recovery efforts.

We reached our conclusion that this criterion has been achieved in spite of the 2008 assessment data which indicate that the ratio of juveniles to adults was less than 2.0 at the five colonies that were assessed. Drew and Clebsch (1995, p. 67) witnessed considerable variability in mortality rates among stage classes of permanently-tagged *Echinacea tennesseensis* individuals measured over the periods 1987–1988 and 1988–1989, which they attributed to interannual variability in rainfall. Based on observations in their first year of study, they determined that seedlings—plants with a cumulative leaf length less than 30 cm (11.8 in)—had a high probability (*i.e.,* approximately 50 percent) of dying during drought conditions (Drew and Clebsch 1995, p. 66) (reference ''Summary of Factors Affecting the Species'' section for the discussion of the coneflower mature plant's attributes that allow it to endure and remain viable through periods of drought).

However, we have not been able to establish a clear relationship between the amount of rainfall and the ratio of juveniles to adults. We acquired data for monthly departures from normal rainfall for the period 1985 through 2010, collected at the Nashville International Airport, from the National Climatic Data Center (2011) to use in assessing available quantitative monitoring data on *Echinacea tennesseensis* for patterns related to growing season precipitation data. Figure 1 presents data on the cumulative departure from normal rainfall during March through August for each year. In reviewing these data for potential influence of growing season rainfall on *E. tennesseensis* ratios of juveniles to adults, we find no clear pattern. For example, Figure 1 suggests that less than normal growing season rainfall during the period 1985 through 1987 would likely have created conditions in which moisture-related stress could have affected plant populations but that situation is not supported by the juvenile-to adult ratios provided in Table 2 for that same time span which show four out of five colonies sampled during 1987 exceeded the two-to-one ratio recommended by the recovery plan. This absence of a clear relationship leads us with no clear conclusion as to why the ratio of juveniles to adults declined in 2008 but we will track this ratio closely as part of our post-delisting monitoring program to ensure that the ratio of juveniles to adults remains at or above the target value in the future.

Figure 1. March through August cumulative departure from normal rainfall (hundredths inches) for each year, 1985 - 2010, at Nashville International Airport (NCDC 2011).



As part of the delisting criterion stated in the recovery plan, each self-sustaining colony should consist of 15 percent cover of flowers over 669 m² (800 yd², 7,200 ft²) of suitable habitat, which has not been met in all cases. However, we have determined that this recommendation of percent coverage of flowers over a particular habitat acreage does not reflect the best available scientific information. Drew and Clebsch (1995, pp. 61–67) conducted monitoring during 1987 through 1989 that established baseline conditions for five of the colonies included in the recovery plan (Service 1989, pp. 3–7); in doing so, they found that percent flower cover of *Echinacea tennesseensis* at these sites ranged from 2 to 12 percent, never exceeding the 15 percent threshold stipulated in the recovery plan. Total percent cover of all vegetation in the habitats where these colonies occur ranged from 42 to 59 percent, meaning that *E. tennesseensis* would have to have constituted 25 to 40 percent of the total vegetative cover to have occupied 15 percent flower cover in these sites. In contrast, *E. tennesseensis* only constituted between 5 and 22 percent of total vegetative cover in plots studied by Drew and Clebsch (1995, p. 63). In addition to the fact that the recovery plan articulated a standard for percent coverage of flowers that was not met by the reference colonies known to exist when the plan was published, a disadvantage of using cover estimates for monitoring a rare species such as *E. tennesseensis* is that this value can change during the course of a growing season; density estimates, on the other hand, remain fairly stable once seedlings have become established following germination (Elzinga *et al.* 1998, p. 178).

The recommendation that each colony occupy 669 m² (800 yd², 7,200 ft²) of suitable habitat does not reflect the range of variability observed in several natural colonies that have been discovered since the recovery plan was completed. Many of these colonies are constrained by the small patches of cedar glade habitat where they occur and provide evidence of a wider range of natural variability in habitat patch size and colony size in this species that was not recognized at the time the recovery plan was published.

We believe that either total counts of plants in various stage classes within a colony of *Echinacea tennesseensis,* or sampling within a known area to generate density estimates (TDEC 2005, pp. 3–4, 16–20), provide superior metrics over cover estimates for monitoring trends in population size. Various sampling designs have been used to estimate density per square meter in one or more colonies of each *E. tennesseensis* population, providing long-term monitoring data to use in judging their stability (Drew and Clebsch 1995, p. 62; TDEC unpublished data). We acknowledge that the confidence intervals are large, reflecting the variability in the data used to produce many of the density estimates (see Table 3 above) produced from the monitoring data for 1998 through 2008. Further, Drew and Clebsch (1995, p. 62) did not provide a measure of precision for the estimated densities they reported from 1987 for some colonies. However, these are the best scientific data available for judging the stability of these populations since initial monitoring data were collected in 1987. We believe that the available quantitative data demonstrate that while *E. tennesseensis* densities fluctuate over time, the species' density has remained comparable to reference values provided by Drew and Clebsch (1995, p. 62). The exception to this trend is colony 4.1, which was located in a heavily disturbed site and was destroyed sometime after monitoring was conducted during 2004 and before flowering stems were counted at each colony in 2005. Prior to its destruction, estimated densities at this colony exceeded the reference values. Despite the loss of this colony, the recovery criterion for *Echinacea tennesseensis* has been met.

While quantitative monitoring data are not available for all *Echinacea tennesseensis* colonies, we believe these monitoring results are indicative of the species' overall viability because they are distributed among its six populations. The monitoring data discussed above in relation to the recovery criterion definition of self-sustaining provide a measure of the sustainability of both natural and introduced populations and also demonstrate the temporal variability both in density and relative abundances of juvenile and adult stage classes. These data, combined with flowering stem counts at all colonies in 2005 (Table 1, TDEC 2006, pp. 4–5) and qualitative data (TDEC 1996, Appendix

I, TDEC 2010) for all colonies documenting whether they have persisted over time, changed dramatically in abundance, or are threatened by natural or human-caused factors, are adequate for judging whether the colonies should be considered self-sustaining. Using these data we have determined that 31 out of the total 35 colonies are self-sustaining, 19 of which are the colonies described above as secure. We discuss the available data for each colony below under the subheading *Recovery Action (5): Monitor colonies and conduct management activities, if necessary, to maintain the recovered state in each colony.*

The current recovery plan identifies six primary actions necessary for recovering *Echinacea tennesseensis:*

(1) Continue systematic searches for new colonies;

(2) Secure each colony;

(3) Provide a seed source representative of each natural colony;

(4) Establish new colonies;

(5) Monitor colonies and conduct management activities, if necessary, to maintain the recovered state in each colony; and

(6) Conduct public education projects.

Each of these recovery actions has been accomplished. The Service entered into a cooperative agreement with TDEC in 1986, as authorized by section 6 of the Act, for the conservation of endangered and threatened plant species, providing a mechanism for TDEC to acquire Federal funds that have supported much of the work described here. The State of Tennessee and other partners have provided matching funds in order to receive funding from the Service under this agreement.

Recovery Action (1): Continue Systematic Searches for New Colonies

There were eight colonies of *Echinacea tennesseensis* known to exist when the recovery plan was completed (Service 1989, pp. 3–7). TDEC and its contractors conducted searches of cedar glades, identified through the use of aerial photography and topographic maps, during the late 1980s through 1990 and found five previously unknown colonies of *Echinacea tennesseensis* (TDEC 1991, p. 1). Two of these colonies were considered additions to the Vine population (TDEC 1991, p. 2), or population 3 as described in the recovery plan (Service 1989, pp. 4–5). One colony was considered an addition to the Mount View population (TDEC 1991, p. 2), or population 1 of the recovery plan (Service 1989, p. 3). A fourth colony was considered an addition to the Couchville population (TDEC 1991, p. 3), or population 5 of the recovery plan (Service 1989, p. 7). The fifth colony was smaller, not in a natural setting, and not assigned to any of the recovery plan populations in the TDEC report (1991, p. 2). Other colonies have been discovered during the course of surveys conducted in the cedar glades of middle Tennessee, and the number of extant natural colonies now totals 15. A summary of the currently known populations (as well as the natural and introduced colonies they are comprised of) is provided in Table 1 above, and in the discussion concerning recovery action number (5). Because systematic searches for new colonies have been conducted since the completion of the recovery plan and have led to the discovery of previously unknown colonies, we consider this recovery action to be completed.

Recovery Action (2): Secure Each Colony

We have assessed the security of each *Echinacea tennesseensis* colony based on observations about threats and defensibility ranks reported in the 1996 status survey of this species (TDEC 1996, Appendix I) and information in our files concerning protection actions, such as construction of fences. We consider 14 of the 16 colonies within DSNAs to be secure. The only exceptions to this determination are colonies 2.4 and 2.7, which lie within portions of the extensive Cedars of Lebanon State Forest DSNA that have been threatened by past outdoor recreational vehicle (ORV) use or are generally degraded cedar glade habitat. The State of Tennessee's Natural Area Preservation Act of 1971 (T.C.A. 11–1701) protects DSNAs from vandalism and forbids removal of endangered and threatened species from these areas. TDEC monitors these sites and protects them as needed through construction of fences or placement of limestone boulders to prevent illegal ORV access. We do not consider secure the nine colonies that exist only on private land and are not under some form of recovery protection agreement. The introduced population at the Stones River National Battlefield DSNA consists of three secured colonies requiring no protective management, as access is controlled by the National Park Service (NPS). The site where these colonies are located became a DSNA in 2003.

The recovery plan states that *Echinacea tennesseensis* will be considered recovered when there are ''at least five secure wild populations, each with three self-sustaining colonies of at least a minimal size.'' There are now 19 secure, self-sustaining colonies of *E. tennesseensis* distributed among six populations (see Table 1 above), fulfilling the recovery plan intentions of establishing a sufficient number and distribution of secure populations and colonies to remove the risk of extinction for this species within the foreseeable future. Therefore, we consider this recovery action completed.

Recovery Action (3): Provide a Seed Source Representative of Each Natural Colony

The Missouri Botanical Garden (MOBOT), an affiliate institution of the Centers for Plant Conservation (CPC), collected accessions of seeds from each of the six populations currently in existence during 1994 (Albrecht 2008a pers. comm.) and from four of those populations during 2010 (Albrecht 2010, pers. comm.). This collection is maintained according to CPC guidelines (Albrecht 2008b, pers. comm.). Five of the accessions taken by MOBOT were provided to the National Center for Genetic Resource Preservation (NCGRP) in Fort Collins, Colorado, for long-term cold storage. The NCGRP protocol is to test seed viability every 5 years for accession, and MOBOT also tests seed viability on a periodic basis and collects new material for accessions every 10 to 15 years (Albrecht 2008b, pers. comm.).

While these accessions do not contain seed from every unique colony, they represent each of the populations of *Echinacea tennesseensis.* These accessions provide satisfactory material should establishment of colonies from reintroductions or additional introductions become necessary in the future, as Baskauf *et al.* (1994, pp. 184–186) concluded that there is a low level of genetic differentiation among populations of *E. tennesseensis* and the origin of seeds probably is not a critical concern for establishing new populations. Therefore, we consider this recovery action completed.

Recovery Action (4): Establish New Colonies

TDEC (2006, pp. 3–6) reported flowering stem counts for 21 introduced colonies, but we have eliminated two of these from our analysis of the current status of *Echinacea tennesseensis.* One of these excluded colonies was introduced into a privately owned glade well outside of the known range of the species in Marshall County, consists of only a few vegetative stems, and is of doubtful viability. The other introduced colony that we excluded is located in Rutherford County, approximately 7 miles from the nearest *E. tennesseensis* population, and is believed to contain hybrids with *E. simulata.* Hybridization

between these two species has not been reported at any other site. The number of flowering stems reported from the monitored colonies during 2005 ranged from only 1 to 6,183, and only one of these colonies had fewer than 100 flowering stems (TDEC 2006, pp. 4–5). An additional introduced colony (2.9) that was not surveyed during 2005, but contained thousands of plants in 2006 (Lincicome 2006, pers. comm.), brings the number of extant introduced colonies to 20. These 20 colonies were established at various times since 1970, through the introductions of seed or transplanted individuals (TDEC 1991, pp. 3–7; TDEC 1996, Appendix I; Lincicome 2008, pers. com.), often from an undocumented or mixed origin with respect to the source populations (Hemmerly 1976, p. 81; Hemmerly 1990, pp. 1–8; TDEC 1991, pp. 4–8; Clebsch 1993, pp. 8–9). Numerous nurseries have grown *E. tennesseensis* for the purpose of providing seeds and plants for establishing new colonies (TDEC 1991, pp. 3–8). Baskauf *et al.* (1994, pp. 184–186) determined that less than 10 percent of the genetic variability of *E. tennesseensis* is distributed among populations and concluded from this low level of differentiation that the origin of seed used in establishing new populations probably is not a critical consideration. We summarize the distribution of these introduced colonies among *E. tennesseensis* populations in the discussion concerning recovery action number (5) below. Because 20 new colonies have been established, we consider this recovery action completed.

Recovery Action (5): Monitor Colonies and Conduct Management Activities, if Necessary, To Maintain the Recovered State in Each Colony

Drew and Clebsch (1995, pp. 62–67; Drew 1991, pp. 9–11) conducted the first monitoring of *Echinacea tennesseensis* during the summer of 1987, in the primary colony of each of the five populations included in the recovery plan (Service 1989, pp. 3–7). For this monitoring effort, all non-flowering *E. tennesseensis* were classified as juveniles during quadrat sampling. Clebsch (1993, pp. 11–16) sampled four additional colonies during 1992, and provided ratios among life stage-classes and estimates of total individuals for each, but did not estimate mean density per square meter. Based on results of demographic research by Drew (1991), Clebsch (1993, p. 11) modified stage-class definitions as follows: Adults were plants that produced flowering stems, juveniles were non-flowering plants with cumulative leaf length greater than 30 cm (11.8 in.), and seedlings were non-flowering plants with cumulative leaf length less than 30 cm (11.8 in.).

TDEC (unpublished data) monitored each of the colonies that Drew and Clebsch (1995, pp. 62–67) sampled and one of the colonies Clebsch (1993, pp. 9–11) sampled one or more times in the years 1998, 2000, 2001, 2004, and 2008, and conducted the first quantitative monitoring of five introduced colonies in 2006. TDEC characterized stage classes as follows: Adults are plants that produce flowering stems; juveniles are non-flowering plants with leaves greater than 2 cm (.79 in.) in length; seedlings are non-flowering plants with leaves less than 2 cm (.79 in.) in length.

Table 1, above, lists each of the populations and associated colonies, the date they were first recorded in the Tennessee Natural Heritage Inventory Database (TDEC 2010), the number of flowering stems observed at the colony in 2005 (TDEC 2006, pp. 4–5), whether they are of natural or introduced origin, and whether we consider them to be secure or self-sustaining. Tables 2 and 3, above, present ratios among juvenile and adult stage-classes and estimates of *Echinacea tennesseensis* mean density per square meter that have been produced from monitoring efforts.

The Mount View population (number 1 in the recovery plan) consisted of a single known colony when the recovery plan was completed (Service 1989, p. 3). This population now includes two more colonies, both introduced, in addition to the original colony 1.1, which is located in Mount View DSNA. These three colonies are located within an approximately 2.5 km^2 (1 mi^2) area in Davidson County. The total number of flowering stems counted in the Mount View population in 2005 was 6,278. In 1987, Drew and Clebsch (1995, p. 62) estimated the size of the population at colony 1.1 to be 12,000 plants occupying an area of 830 m^2 (8,934 ft^2). TDEC (2006, p. 4) reported 5,430 flowering stems at this site (colony 1.1) in 2005. The mean ratio of juveniles to adults for this colony over 5 years of monitoring is 3.45 (Table 2) and density estimates (Table 3) have remained comparable to or have exceeded the initial estimate provided by Drew and Clebsch (1995, p. 62) for 1987. Colony 1.2 was discovered on private land in 1990 (TDEC 1996, Appendix I, p. III), and Clebsch (1993, p. 18) estimated there were 9,057 plants, bearing 3,506 flowering heads, occupying an area of 682 m^2 (7,341 ft^2) in 1992. The colony on private land was bulldozed in 1999. Colony 1.2 now consists of plants introduced onto adjacent U.S. Army Corps of Engineers (COE) lands to provide long-term protection (TDEC 2003, p. 2). While colony 1.2 was reduced in size when the private lands where it occurred were developed, the colony has increased in size since it was relocated onto COE lands and a fence was constructed. TDEC (2006, p. 4) counted 252 flowering stems at colony 1.2 in 2005. Colony 1.4 also was established on COE lands, near a public use area at J. Percy Priest Reservoir, using plants grown at Tennessee Tech University and was estimated to have consisted of 70–80 plants in 1996 (TDEC 1996, Appendix I, p. V). TDEC (2006, p. 5) reported there were 596 flowering stems at colony 1.4 in 2005. Each of the colonies in the Mount View population is considered secure, and the available quantitative and qualitative data indicate they are self-sustaining.

The Vesta population (number 2 in the recovery plan) consisted of two known colonies when the recovery plan was completed (Service 1989, pp. 3–4). This population now consists of eight colonies primarily located within an area of approximately 3 km^2 (1.5 mi^2) in Wilson County. Five of these colonies (2.3, 2.4, 2.6, 2.7, and 2.9) were introduced. Colony 2.1 occurs primarily in the Vesta Cedar Glade DSNA, with approximately 15 percent lying outside the DSNA on private lands. Drew and Clebsch (1995, p. 62) estimated that this colony consisted of 20,900 plants occupying an area of 1,420 m^2 (15,285 ft^2) in 1987. TDEC (2006, p. 4) counted 7,790 flowering stems at this colony in 2005. The mean ratio of juveniles to adults for this colony over 6 years of monitoring is 3.21 (Table 2), and density estimates (Table 3) have remained comparable to the initial estimate provided by Drew and Clebsch for 1987 (1995, p. 62). Colonies 2.2 and 2.8 are located entirely within the Vesta Cedar Glade DSNA in glade openings that are separated by forested habitat; colony 2.2 was reported in the recovery plan to have consisted of approximately 5,000 plants occupying an area of approximately 140 m^2 (1,500 ft^2), in addition to several small clumps that Hemmerly (1976, pp. 81) established from seed. TDEC (1996, Appendix I, p. VII) estimated this colony occupied an area of 374 m^2 (4,026 ft^2) in 1996, and counted 4,274 flowering stems at this colony in 2005 (TDEC 2006, p. 4). Colony 2.8 is located in a glade opening, approximately one-tenth of a mile southwest of colony 2.2, and TDEC (2006, p. 5) counted 2,143 flowering stems at this colony in 2005. Colonies 2.3, 2.4, and 2.7 are located in the Cedars of Lebanon State Forest DSNA.

Colony 2.3 was planted in 1983 with seeds produced in a Tennessee Valley Authority greenhouse from Vesta population stock; in 1996, TDEC (1996, Appendix I, p. VIII) observed 50 to 100 plants occupying an area of approximately 15 m^2 (161 ft^2). TDEC (2006, p. 5) reported there were 139 flowering stems here in 2005. Only one flowering stem was observed at colony 2.4 in 2005 (TDEC 2006, p. 5). Colony 2.7 is a small occurrence believed to have been introduced, but for which no reliable data prior to 2005 exist, at which time 6 flowering stems were counted at this site (TDEC 2006, p. 5). Colony 2.6 was planted at the entrance to Cedars of Lebanon State Park prior to 1982 and was observed in 1996 to include approximately 100 plants (TDEC 1996, Appendix I, p. XI); in 2005 there were 252 flowering stems (TDEC 2006, p. 5). Colony 2.9 was introduced into a powerline right-of-way on private land adjacent to Cedars of Lebanon State Forest in 1994, and was brought to TDEC's attention in 2006, at which time there were thousands of plants (Lincicome 2006, pers. comm.). Of the four secure colonies (2.1, 2.2, 2.3, and 2.8) in this population, available quantitative and qualitative data demonstrate that three are self-sustaining. We do not have historic data for colony 2.8, which was first observed in 2003, but the large number of flowering stems at this colony in 2005 suggests that it also should be self-sustaining. The total number of flowering stems counted in the four secure and self-sustaining colonies of the Vesta population was estimated to be 14,346 in 2005. Colonies that we do not consider secure accounted for 259 flowering stems in 2005.

The Vine population (number 3 in the recovery plan) consisted of three known colonies at the time the recovery plan was completed (Service 1989, pp. 4–6). This population now consists of 11 colonies located within an area of approximately 17 km^2 (7 mi^2) in Wilson and Rutherford Counties. Three of these colonies (3.7, 3.8, and 3.9) were introduced. Approximately two-thirds of the land on which colony 3.1 is located lies within Vine Cedar Glade DSNA, with the remaining one-third on private land. Drew and Clebsch (1995, p. 62) estimated that colony 3.1 consisted of 20,200 plants occupying an area of 800 m^2 (8611 ft^2) in 1987. TDEC (1996, Appendix I, p. XI–XII) reported the plants occupied about 760 m^2 in 1996, and counted 7,555 flowering stems at this colony in 2005 (TDEC 2006, p. 4). The mean ratio of juveniles to adults for this colony over 5 years of monitoring is 4.54 (Table 2) and density estimates (Table 3) have remained comparable to the initial estimate provided by Drew and Clebsch for 1987 (1995, p. 62). Most of colony 3.2 is located in a site recently acquired by TDEC using a Recovery Land Acquisition Grant and matching State funds for addition to the State's natural areas system and was estimated in the recovery plan to contain as many as 50,000 plants (Service 1989, p. 5). Data are summarized here for four element occurrences that TDEC tracks and which make up this colony. Clebsch (1993, p. 16) estimated a total of 94,537 plants at this colony in 1996, with 29,014 flowering heads, occupying an area of 5,889 m^2 (63,389 ft^2), and found that the ratio of juveniles to adults was 1.94; in 2005 there were 25,956 flowering stems (TDEC 2006, p. 4). The portions of the colony that lie entirely or mostly within the recently protected lands contained 24,914 of these flowering stems. Colonies 3.3 through 3.7 occur on private land. Colony 3.3 is located in a site that was highly disturbed and consisted of 90 plants in 1996 (TDEC 1996, Appendix I, p. XIV). This colony contained 11 flowering stems in 2005 (TDEC 2006, p. 4), and remains a small colony of questionable viability today. Colony 3.4 is located in the Gattinger Glade and Barrens DSNA, which is owned by the developers of the Nashville Super Speedway who donated a conservation easement to the State of Tennessee. Clebsch (1993, p. 16) estimated there were 71,576 plants at colony 3.4 in 1992, with 13,355 flowering heads. TDEC estimated this colony occupied an area of 2,723 m^2 (23,310 ft^2) in 1996, and reported there were 12,979 flowering stems at this colony in 2005 (TDEC 2006, p. 4). The mean ratio of juveniles to adults for this colony over 3 years of monitoring is 4.78 (Table 2). Clebsch (1993, pp. 9–11) did not provide density estimates for this colony in 1992; however, density estimates produced from monitoring conducted by TDEC in 2004 and 2008 are comparable to those generated for other long-term monitoring sites (Table 3). While damage from ORV use has been observed at this colony in the past (TDEC 1996, Appendix I, p. XV), it has not been noted since the site became a DSNA, and we consider it secure. Clebsch (1993, p. 18) estimated a total of 15,769 plants bearing a total of 3,058 flowering heads at colony 3.5 in 1992, with a ratio of 1.88 juveniles to adults, occupying an estimated area of 669 m^2 (7,201 ft^2). TDEC (1996, Appendix I, p. XVI) observed that the density of plants had decreased at this colony in 1996, while the plants occupied a larger area—an estimated 1,483 m^2 (15,963 ft^2). TDEC (2006, p. 4) reported 2,529 flowering stems were present at this colony in 2005. TDEC (1996, Appendix I, p. XVII) observed about 50 plants in a 1-m^2 (11-ft^2) area at colony 3.6 in 1996, and in 2005 there were 157 flowering stems counted in this colony. Colony 3.7 was established from seeds planted in 1978 and 1979, on private property owned by a native plant enthusiast. While many plants were killed during drought conditions in 1980, TDEC (1996, Appendix I, p. XVIII) reported that there were approximately 250 plants at this colony in 1985, and between 300 and 500 plants in 1996. TDEC (2006, p. 4) reported there were 1,705 flowering stems at this colony in 2005. Colonies 3.8 and 3.9 were established from seeds planted into two sites at Cedars of Lebanon State Forest in 1990 and 1991. In 1996, TDEC (1996, Appendix I, p. XIX) counted 452 plants by surveying eight glades/barrens within the larger complex where colony 3.8 is located. TDEC (2006, p. 5) reported there were 1,863 flowering stems at colony 3.8 in 2005. TDEC (1996, Appendix I, p. XX) observed approximately 200 to 300 plants occupying an estimated area of 51 m^2 (549 ft^2) at colony 3.9 in 1996; in 2005, there were 2,744 flowering stems counted at this colony (TDEC 2006, p. 5). We have no data prior to 2005 for colonies 3.10 and 3.11, both of which are located on private land. In 2005, TDEC (2006, p. 5) reported there were 5,374 flowering stems at colony 3.10, which is located near the Nashville Super Speedway; there were 1,935 flowering stems at colony 3.11. Available quantitative and qualitative data indicate that the four secure colonies (*i.e.,* 3.1, 3.2, 3.4, and 3.9) in this population are self-sustaining, as are six of the non-secure colonies (Table 1). The total number of flowering stems in secured and self-sustaining colonies of the Vine population was 48,192 in 2005. Colonies that we do not consider secure accounted for 14,616 flowering stems in 2005.

The Allvan population (number 4 in the recovery plan) consisted of one known colony (4.1) at the time the recovery plan was completed; two other colonies had been extirpated from this population (Service 1989, p. 6). This population now consists of two introduced colonies on public lands, as colony 4.1 has been lost to disturbance. Drew and Clebsch (1995, pp. 62–64) estimated a total of 3,700 plants at colony 4.1 in 1987, occupying an estimated area of 470 m^2 (5,059 ft^2), and

noted the vegetation at this site differed from the other colonies probably as a result of human disturbance. TDEC (1996, Appendix I, p. XXI) noted the poor condition of *Echinacea tennesseensis* plants during a site visit to colony 4.1 in 1996, and observed no plants at this colony in 2005 (TDEC 2006, p. 4). The mean ratio of juveniles to adults for this colony over 4 years of monitoring was 4.52 (Table 2) and density estimates (Table 3) were comparable to or exceeded the initial estimate provided by Drew and Clebsch for 1987 (1995, p. 62), until the colony was destroyed sometime after monitoring was conducted during 2004 and before flowering stems were counted at each colony in 2005. Colonies 4.2 and 4.3 were established from seeds and cultivated juveniles planted on COE lands at J. Percy Priest Reservoir in the years 1989 through 1991 (TDEC 1991, pp. 5–6), and earthen berms have been constructed at both sites to deter ORV traffic and reduce visibility of these colonies. In 1996, colony 4.2 contained many robust adult plants, but few seedlings and non-flowering adults, in an area of 32 m^2 (344 ft^2) (TDEC 1996, Appendix I, p. XXII). In 2005, TDEC reported there were 6,183 flowering stems at colony 4.2. TDEC first conducted quantitative monitoring at this colony in 2006, when the ratio of juveniles to adults they sampled was 4.78 (Table 2). The estimated mean density was 11.60 *E. tennesseensis* per square meter (Table 3). This secure colony is located in the Elsie Quarterman Cedar Glade DSNA, on COE lands at J. Percy Priest Reservoir, and appears to be self-sustaining based on the quantitative and qualitative data available. Colony 4.3 is located near the COE Hurricane Public Access Area. In 1996, this colony consisted of many robust adult plants and abundant juveniles in an area of about 68 m^2 (732 ft^2) (TDEC 1996, Appendix I, p. XXIII). In 2005, TDEC (2006, p. 5) counted 385 flowering stems at this colony. TDEC (unpublished data) first conducted quantitative monitoring at this colony in 2006, when the ratio of juveniles to adults they sampled was 11.95 (Table 2). The estimated mean density was 19.50 *E. tennesseensis* per square meter (Table 3). However, we acknowledge that the confidence intervals for the density estimates at both sites are large, reflecting a high degree of variability among the transects that were sampled at each colony. We believe that colony 4.3 is self-sustaining; however, it is vulnerable to impacts from illegal ORV access as noted above. Based on available data, colony 4.2 is the only secure and self-sustaining colony in the Allvan population.

The Couchville population (number 5 in the recovery plan) consisted of a single known colony spanning approximately eight privately owned tracts when the recovery plan was completed (Service 1989, p. 7). This population now consists of three natural and five introduced colonies, all located within an approximately 2.8-km^2 (1.1-mi^2) area of Davidson and Rutherford Counties on lands owned by the State of Tennessee (except for colony 5.2, which is on private land). Drew and Clebsch (1995, p. 62) estimated a total of 89,300 plants at colony 5.1 in 1987, occupying an estimated area of 13,860 m^2 (149,189 ft^2). TDEC (2006, p. 4) reported there were 7,353 flowering stems at this site in 2005. The mean ratio of juveniles to adults for this colony over 6 years of monitoring is 3.87 (Table 2) and density estimates (Table 3) have remained comparable to the initial estimate provided by Drew and Clebsch for 1987 (1995, p. 62). Colony 5.2 is divided between two privately owned properties. The plants in this colony are found in habitats of varying quality, having been subjected to past disturbance in some places, and in 1993, vegetative plants were observed occupying an area of approximately 1,823 m^2 (19,623 ft^2) (TDEC 1996, Appendix I, p. XXV). TDEC (2006, p. 4) reported there were 392 flowering stems at this colony in 2005. Colonies 5.3 through 5.6 were established from seed and juveniles planted at Long Hunter State Park during 1989 through 1991. TDEC (1996, Appendix I, p. XXVI) observed 428 plants at colony 5.3 in 1996, and noted that they were spread out over a wide area; in 2005, TDEC (2006, p. 4) reported there were 1,607 flowering stems at this colony. TDEC (1996, Appendix I, p. XXVII) observed that a thriving population containing thousands of individuals had become established at colony 5.4 by 1996, and that the plants north of the road dividing this colony occupied an area of 2,153 m^2 (23,175 ft^2); in 2005, TDEC (2006, p. 5) counted 863 and 987 flowering stems on the north and south sides of the road, respectively. Colony 5.5 consisted of less than 200 total plants occupying an estimated area of 53 m^2 (570 ft^2) in 1996 (TDEC 1996, Appendix I, pp. XXVIII–XXIX); in 2005, there were 1,300 flowering stems (TDEC 2006, p. 4). TDEC (unpublished data) first conducted quantitative monitoring at this colony in 2006, when the ratio of juveniles to adults they sampled was 4.12 (Table 2) and the estimated density was 12.03 *Echinacea tennesseensis* per square meter (Table 3). Colony 5.6 consisted of approximately 2,000 plants occupying an area of 51 m^2 (549 ft^2) in 1996 (TDEC 1996, Appendix I, p. XXIX–XXX); in 2005, there were 846 flowering stems (TDEC 2006, p. 5). Colony 5.7, for which no historic monitoring data are available, is the only naturally occurring colony at Long Hunter State Park. TDEC (2006, p. 4) counted 17 flowering stems here in 2005. Colony 5.8 was established in 2000 at the Fate Sanders Barrens DSNA, located on COE lands at J. Percy Priest Reservoir. This colony is located approximately 3.5 km (2.8 mi) southeast of colony 5.3 in the Couchville population. TDEC planted 199 plants into two areas at this colony in 2000 (Lincicome 2008, pers. comm.) and counted 101 flowering stems in 2005 (TDEC 2006, p. 5). Based on available qualitative and quantitative data, we believe that the secure colonies (5.1, 5.4, 5.6, and 5.8) in the Couchville population are self-sustaining,. We believe that three of the four colonies we consider not secure are also self-sustaining. The total number of flowering stems from the Couchville population in secure and self-sustaining colonies was 10,150 in 2005. Colonies that we do not consider secure accounted for an estimated 3,316 flowering stems in 2005.

The Stones River National Battlefield population (*i.e.,* population 6, not included in the recovery plan) consists of three colonies established through introductions into an area that is now a DSNA. Colony 6.1 was established from seeds introduced by Hemmerly in 1970 (1976, pp. 10, 81) as part of investigations into seedling survival under field conditions. This colony consists of two groupings of plants, one of which consisted of 3,880 plants and the other of 28 plants in 1995; the colony occupied an area of 39 m^2 (420 ft^2) in 1996 (TDEC 1996, Appendix I, p. XXXI). TDEC (2006, p. 4) counted 2,535 flowering stems at this colony in 2005. TDEC first conducted quantitative monitoring at colony 6.1 in 2006, when the ratio of juveniles to adults they sampled was 5.18 (Table 2). The estimated mean density was 41.37 *Echinacea tennesseensis* per square meter (Table 3), but the confidence interval at this site was large, reflecting a high degree of variability among the sampled transects, some of which contained no plants. Colonies 6.2 and 6.3 are thought to have been established by a neighbor of the battlefield in the mid-1990s (Hogan 2008, pers. comm.) and consisted of 134 and 401 plants, respectively, in 1995 (TDEC 1996, Appendix I, p. XXXII). In 2005, TDEC

(2006, p. 4) counted 237 flowering stems at colony 6.2 and 852 flowering stems at colony 6.3. The total number of flowering stems in the Stones River National Battlefield population in 2005 was 3,624 (TDEC 2006, 4). Based on available quantitative and qualitative data, we believe all colonies in this population are secure and self-sustaining.

Numerous partners are involved in managing *Echinacea tennesseensis* populations on their lands. TDEC compared management options at the Vesta Cedar Glade DSNA, including mowing, discing, burning, and application of selective herbicides for removal of grasses (Clebsch 1993, pp. 2–8). TDEC and TNC have used grazing of goats, mechanical removal, and herbicide applications to control woody species encroachment on the margins of cedar glade openings at Mount View Glade DSNA (TDEC 2003, pp. 4–9). TDEC applies prescribed fire or mechanical removal, as needed and within constraints imposed by locations within the urban interface, to control woody species, including the invasive exotic privet (*Ligustrum* sp.), at many DSNAs where *E. tennesseensis* occurs; these include Mount View Glade, Vesta Cedar Glade, Vine Cedar Glade, Cedars of Lebanon State Forest Natural Area, Gattinger's Cedar Glade and Barrens, Elsie Quarterman Cedar Glade, Fate Sanders Barrens, and Couchville Cedar Glade and Barrens. TDEC works with the Tennessee Division of Forestry (TDF) to ensure that colonies in the Cedars of Lebanon State Forest, which includes three DSNAs, receive necessary management and collaborates with TDF to implement all prescribed burns that are conducted on DSNAs. TDEC also has cooperated with COE on construction of fences or earthen berms around sites at J. Percy Priest Reservoir that have been threatened by urban encroachment and illegal ORV use. The NPS monitors the introduced population at the Stones River National Battlefield and controls woody plant encroachment and vegetation succession in the glade openings where the colonies occur, as necessary.

Because TDEC and other entities have monitored *Echinacea tennesseensis* populations many times since the time of listing and have managed colonies on protected lands to minimize threats from vegetation succession and ORV use, and will continue to do so in the foreseeable future, we consider this recovery action completed.

Recovery Action (6): Conduct Public Education Projects

Echinacea tennesseensis was featured in newspaper (Paine 2002, p. 6B) and magazine (Simpson and Somers 1990, pp. 14–16; Campbell 1992, p. 32; Daerr 1999, p. 50) articles to educate the general public about the species, the cedar glade ecosystem it occupies, and the conservation efforts directed towards them. The Service published ''An Educator's Guide to the Threatened and Endangered Species and Ecosystems of Tennessee,'' which includes instructional materials about the cedar glades of middle Tennessee and two Federally listed plant species found in the glades, *E. tennesseensis* and *Astragalus bibullatus* (Pyne's ground-plum) (Service no date, pp. 50–53). TDEC personnel periodically lead guided wildflower walks in the cedar glades DSNAs and educate the public about *E. tennesseensis* and other Federal and State listed plant species during those walks. In 2000, TDEC published 10,000 copies of an educational poster featuring Tennessee's rare plants, including *E. tennesseensis.* Because numerous public education projects have been conducted, we consider this recovery action completed.

Summary of Comments and Recommendations

During the open comment period for the proposed rule (75 FR 48896, August 12, 2010), we requested that all interested parties submit comments or information concerning the proposed delisting of *Echinacea tennesseensis.* We directly notified and requested comments from the State of Tennessee. We contacted all appropriate State and Federal agencies, county governments, elected officials, scientific organizations, and other interested parties and invited them to comment. We also published a newspaper notice in The Tennesseean, a newspaper serving the middle Tennessee region where *E. tennesseensis* occurs, inviting public comment.

As stated in the proposed rule (75 FR 48896, August 12, 2010), we accepted comments for 60 days, ending October 12, 2010. During the comment period, we received comments from two individuals.

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), and the Office of Management and Budget's (OMB) December 16, 2004, Final Information Quality Bulletin for Peer Review, we solicited independent opinions from 4 knowledgeable individuals who have expertise with the species, who are within the geographic region where the species occurs, or are familiar with the principles of conservation biology. We received comments from one of the peer reviewers.

We reviewed all comments received from the peer reviewer and the public for substantive issues and new information regarding the proposed delisting of *Echinacea tennesseensis.* Substantive comments received during the comment period are addressed below and, where appropriate, incorporated directly into this final rule and into the post-delisting monitoring plan.

Issue 1: One commenter requested that we address the site quality for the colonies that comprise the Allvan population and the growth of these colonies over time compared to other colonies, despite the fact that this population is not needed to meet the criteria in the recovery plan that there must be five populations with three secure and self-sustaining colonies each. This request was made because Drew and Clebsch (1995, p. 64) observed during surveys conducted in 1987 that the Allvan site, where colony 4.1 was located, had a much different plant community assemblage than other *Echinacea tennesseensis* sites due to human disturbance and because the commenter apparently believed that colonies 4.2 and 4.3 also were located at this disturbed site.

Response: Drew and Clebsch (1995, p. 62) concluded that human disturbance had altered the vegetation community at the site where the original colony (4.1) of the Allvan population was located. The dominant species they observed at the Allvan site (*Grindelia lanceolata, Silphium trifoliatum,* and *Aster pilosus* var. *priceae*) were absent or present in low frequency at other sites. Conversely, the dominant species from the other sites were only present in low frequency and numbers at the site of colony 4.1. These differences were likely attributable to the intensive use that this site, owned by a trucking company, had experienced. The portion of the property where *E. tennesseensis* once occurred was used in the past as a discard site for old engine parts and other assorted scrap materials (TDEC 1996, Appendix I, p. XXI). As noted above, the colony at this site was destroyed prior to flowering stem counts in 2005.

Colonies 4.2 and 4.3 of the Allvan site were both established on COE lands, in distinct sites from colony 4.1, from introductions during the years 1989 through 1991. In contrast to the site conditions where colony 4.1 was once located, TDEC (1996, Appendix I, pp.

XXI–XXIV) described the habitat at these sites as ''dry barrens and glades'' (colony 4.2) and ''open gravelly glades and barrens'' (colony 4.3), but made no observations of atypical composition of associated species present at these sites. While we do not have numbers to specifically address growth rates in colonies 4.2 and 4.3, in the section above addressing recovery action (5), we discuss quantitative monitoring data collected at each of these sites in 2006. Both of these colonies are also included in the Post-delisting Monitoring Plan for *Echinacea tennesseensis.*

Issue 2: Two commenters supported the use of analyzing variability and trends over time in density metrics derived from count data as a measure of population size, rather than using the Recovery Plan criterion that minimal size for each colony be 15 percent cover of flowers over 800 square yards of suitable habitat. However, one of these commenters expressed concern that the proposed delisting rule reported only one census of the total number of flowering stems along with an extrapolated total number of plants and number of adults (*i.e.,* flowering plants). This commenter noted that ''by choosing to report counts from only one year, annual count fluctuation and sample area size are not considered.'' This commenter suggested that stem counts collected by Drew and Clebsch (1995) from their sample plots in the first census of the species in 1987 could be used to establish reference densities, and that more recent site densities calculated from flowering stem counts would be an acceptable substitute for the objective size criterion provided in the Recovery Plan.

Response: We have incorporated available quantitative data on density estimates and ratios of juveniles to adults into this final rule. We did not use data from the 2005 flowering stem counts conducted at all sites (TDEC 2006, pp. 4–5) to estimate flowering stem densities, because the area surveyed was not documented during that effort. We agree with the commenter that estimating the total number of individuals in a colony based on flowering stem counts from a single year is not appropriate and have removed those estimates from Table 1 in this rule, as explained above in the Species Information section.

Issue 3: Two commenters requested more information be presented on the status of the *Echinacea tennesseensis* populations as it relates to the Recovery Plan criterion that defines self-sustaining populations as those in which there are two juvenile plants for every flowering plant. Specifically, one commenter noted that the proposed rule to delist *E. tennesseensis* reported that six colonies were sampled once for the juvenile stage class, in 2006, and that the average of these colonies did not meet this criterion. This commenter noted that it was unclear whether these sampled colonies that did not meet the self-sustaining criterion were included in the group of colonies reported in the rule to be self-sustaining, adding that regular recruitment is required for the persistence of a population, or in this case, an introduced colony. The other commenter noted that one must assume that this criterion was applied when determining whether to classify a population as self-sustaining in Table 1 of the proposed rule. Both commenters also requested additional detail concerning how the ratios were derived that were used to estimate (1) numbers of adults based on counts of flowering stems, and (2) numbers of seedlings from estimated numbers of adults, in order to yield the estimated numbers of individuals that were reported in Table 1 of the proposed rule. Specifically, one of the commenters questioned whether the multiplier used to calculate the ratio was an average calculated across monitored colonies, whether multiple years of data were used in calculating this ratio, and whether the accuracy of the ratio in estimating population sizes had been field tested. This commenter also recommended reporting confidence intervals with these estimates to provide a measure of their precision.

Response: The Service and TDEC undertook a thorough review of the monitoring data collected by TDEC and reanalyzed those data to produce ratios among juvenile and adult stage-classes (Table 2, above) and to produce density estimates with confidence intervals for each monitored site (Table 3, above). In doing so, we found errors in the analysis used to determine ratios of juveniles to adults for the introduced colonies for the year 2006. We have incorporated those corrections and provide colony numbers for each colony for which these ratios have been calculated (Table 2, above). We have removed estimates of numbers of adults and total numbers of individuals from Table 1 in this rule, as explained above in the Species Information section. While quantitative data are not available for all colonies to use in determining whether they are self-sustaining, we believe that quantitative data from a representative sample of colonies combined with available qualitative data provide an adequate basis for determining whether the colonies are self-sustaining, as explained above in the Recovery section. Table 1, above, provides a list of all colonies considered in this rule along with our determination of whether each colony is secure, self-sustaining, or both.

Issue 4: Two commenters raised issues related to potential threats associated with climate change, including possible disruption of pollinator services due to potential changes in flowering periods and pollinator behavior; lack of a persistent seed bank to provide resilience to multiple drought years or extreme climatic events; and the potential for increased drought frequency or severity to impact juvenile plants. One of these commenters noted the findings of Drew and Clebsch (1995) that plants with total leaf length < 30 cm were susceptible to a higher rate of mortality due to low drought tolerance. This commenter also pointed out that, according to National Drought Mitigation Center (2010) data, middle Tennessee experienced drought years in 2007 and 2008, including an exceptional drought period from August to September of 2007, and that this drought could have impacted juvenile and other stage classes.

Response: To the extent possible, we address threats related to climate change in the section Summary of Factors Affecting the Species. We do not have sufficient data concerning pollinators of *Echinacea tennesseensis,* their phenology in relation to phenology of *E. tennesseensis,* or potential for changes to the phenology of either to specifically address this comment. However, we have no specific data to suggest that climate change is currently a threat to *E. tennesseensis* or will be in the foreseeable future. We have incorporated information on drought conditions in Middle Tennessee during 2007 and 2008, as well as data on monthly departures from normal rainfall for the period 1985 through 2010, into this rule in the section Recovery and discuss them in relation to available monitoring data.

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing, reclassifying, or removing species from the Federal Lists of Endangered and Threatened Wildlife and Plants. ''Species'' is defined by the Act as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Once the ''species'' is determined we then evaluate whether that species may be

endangered or threatened because of one or more of the five factors described in section 4(a)(1) of the Act. We must consider these same five factors in reclassifying or delisting a species. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate that the species is neither endangered nor threatened for the following reasons: (1) The species is extinct; (2) the species has recovered and is no longer endangered or threatened; and/or (3) the original scientific data used at the time the species were classified was in error.

Under section 3 of the Act, a species is ''endangered'' if it is in danger of extinction throughout all or a ''significant portion of its range'' and is ''threatened'' if it is likely to become endangered within the foreseeable future throughout all or a ''significant portion of its range.'' The word ''range'' refers to the range in which the species currently exists, and the word ''significant'' refers to the value of that portion of the range being considered to the conservation of the species. The ''foreseeable future'' is the period of time over which events or effects reasonably can or should be anticipated, or trends extrapolated. A recovered species is one that no longer meets the Act's definition of endangered or threatened. Determining whether or not a species is recovered requires consideration of the same five categories of threats specified in section 4(a)(1) of the Act. For species that are already listed as endangered or threatened, the analysis for a delisting due to recovery must include an evaluation of the threats that existed at the time of listing, the threats currently facing the species, and the threats that are reasonably likely to affect the species in the foreseeable future following the delisting or downlisting and the removal of the Act's protections.

The following analysis examines all five factors currently affecting, or that are likely to affect *Echinacea tennesseensis* within the foreseeable future. In making this final determination, we have considered all scientific and commercial information available, which includes information received during the public comment period on our proposed delisting rule (75 FR 48896, August 12, 2010), reanalyzed data from monitoring conducted during 1998 through 2004, and monitoring data collected in 2008 (TDEC unpublished data).

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

The final rule to list *Echinacea tennesseensis* as endangered (44 FR 32604) identified the following habitat threats: Habitat loss due to residential and recreational development and succession of cedar glade communities in which the species occurred.

Losses of cedar glade habitat and colonies of *Echinacea tennesseensis* to residential development have posed a significant threat to *E. tennesseensis.* At the time of listing, one population of *E. tennesseensis* had been reduced in size due to housing construction and another was destroyed during the construction of a trailer park. The three extant occurrences at that time were all located on private lands, one of which was imminently threatened by surrounding residential development. This Davidson County occurrence has since been protected as a DSNA. Approximately two-thirds of the Wilson County occurrence that was on public lands is now a DSNA, and one-third remains on private lands. The Rutherford County occurrence was located in a gravel parking lot of a commercial property and has been destroyed. Since the time of listing, protection of natural colonies on publicly owned conservation lands and establishment of additional colonies through introductions have effectively diminished the threat residential development once posed to the survival of *E. tennesseensis.*

The final listing rule for *Echinacea tennesseensis* described recreational development as a threat facing the Davidson County (*i.e.,* Mount View) population, but did not specifically address the nature of the recreational development. The Mount View, Allvan, and Couchville populations occur in close proximity to J. Percy Priest Reservoir, construction of which was completed in 1967. It is possible that development of recreational facilities following completion of the reservoir presented a threat to *E. tennesseensis* or cedar glade habitats. However, four of the secure and self-sustaining colonies (*i.e.,* colonies 1.2, 1.4, 4.2, and 5.8) are located within the now-protected lands buffering the reservoir, three of which were designated as Environmentally Sensitive Areas in the J. Percy Priest 2007 Master Plan Update (U.S. Army Corps of Engineers 2007, pp. 3–1—4–3). Therefore, recreational development no longer poses a threat to the survival of *E. tennesseensis.*

There are now 27 colonies, distributed among the six populations of *Echinacea tennesseensis,* which occur entirely or primarily on conservation lands in either State or Federal ownership. The lone exception to public ownership of these conservation lands is the Gattinger Glade DSNA, which is managed by TDEC but privately owned and protected under a conservation easement. We consider 19 of these colonies to be secure and self-sustaining. Sixteen colonies, all but two of which are secure, are located entirely or primarily within DSNAs that were designated at various times between 1974 and 2009. TDEC manages most of these DSNAs, in some cases cooperatively with TDF, for the purpose of conserving *E. tennesseensis* and the cedar glades and barrens ecosystem that the species depends on for its survival. All but one of these DSNAs lie within or adjacent to State or Federal conservation lands that provide complementary conservation benefits by maintaining functioning ecosystems within which these colonies occur and harboring additional protected colonies of *E. tennesseensis.*

The non-DSNA lands in the Cedars of Lebanon State Forest also contain three colonies, therefore providing a large, protected cedar glade and forest ecosystem connected to the Vesta Cedar Glade, Vine Cedar Glade, and Cedars of Lebanon State Forest DSNAs. An additional colony is located at the Cedars of Lebanon State Park, which is adjacent to the Cedars of Lebanon State Forest. Long Hunter State Park contains six colonies and provides a functioning ecosystem buffer to the Couchville Cedar Glade and Barrens DSNA. COE lands at J. Percy Priest Reservoir provide habitat for three colonies in addition to the colonies in the Elsie Quarterman Cedar Glade and Fate Sanders Barrens DSNAs that lie within these lands. The Gattinger Cedar Glade is the only DSNA on private land that contains a colony of *Echinacea tennesseensis.* While this property is not buffered by other public lands, it lies within a large tract of land owned by the Nashville Super Speedway, which has been a partner in the conservation of *E. tennesseensis.* The three colonies at Stones River National Battlefield are included among the 16 within DSNAs, and lie within a protected buffer provided by NPS lands.

We believe the colonies that are located in DSNAs or on recently acquired lands that will be added to Tennessee's natural area system, with the exceptions of colonies 2.4 and 2.7, will receive adequate long-term protection and necessary management to control vegetation succession and disturbance from human activities, given the statutory protections afforded these lands and TDEC's demonstrated

commitment to protecting lands through this mechanism and to maintaining the quality of habitats in the DSNAs. Colonies 2.4 and 2.7 contain an estimated 1 and 6 flowering stems, respectively. The lack of long-term protection and management for these two colonies will not have a significant effect on the status of the species, as these two colonies represent less than one percent of the Vesta population. We expect that the delisting of *Echinacea tennesseensis* would not weaken TDEC's commitment to the conservation of these DSNAs, several of which harbor one or more Federally listed plant species other than *E. tennesseensis.* We have also identified five colonies on public lands outside of DSNAs that we consider secure.

Illegal ORV activity remains an issue for three colonies on public lands, which we have not counted among the 19 secure colonies. TDEC has worked to reduce this threat in several DSNAs by constructing barbed wire fences and barriers using limestone boulders. The COE has also extended efforts in the form of constructing fences or earthen berms or both near three colonies on lands at J. Percy Priest Reservoir to reduce this threat. Damage from ORV activity was noted by TDEC (1996, Appendix I) at only one of the 9 colonies located exclusively on private lands that are not under recovery protection agreements, none of which were counted among the 19 secure colonies in this rule. While illegal ORV use remains a concern throughout the range of *Echinacea tennesseensis* (TDEC 1996, p. 21 and Appendix I), we do not have evidence to suggest that such activity is occurring at a magnitude that makes *E. tennesseensis* likely to become endangered in the foreseeable future.

Habitat loss or modification in the form of ORV activity has been observed at four colonies (TDEC 1996, Appendix I), and recovery protection agreements are lacking at nine colonies that exist solely on private lands, leaving them vulnerable to habitat disturbance. However, we believe that *Echinacea tennesseensis* is neither endangered nor threatened as a result of habitat loss or modification because there are 19 secure and self-sustaining colonies distributed among six geographically defined populations. Management of these colonies to reduce threats to *E. tennesseensis* and its habitat is coordinated by TDEC in cooperation with other partners. Examples of these management activities were provided under number (5) in the Recovery section.

The listing rule for *Echinacea tennesseensis* (44 FR 32604) identified vegetation succession as a threat to the species and the cedar glades it depends on for its survival. A status survey for the species, completed in 1996 (TDEC 1996, p. 22), did not address this threat in its analysis of factors affecting the survival of the species, but it did recommend controlling vegetation succession at some sites in the appendix containing population and site status reports. TDEC has developed a program for managing vegetation succession and other threats to cedar glades on DSNAs inhabited by *E. tennesseensis* and two other Federally listed species, and continues to work cooperatively with TDF, Tennessee State Parks, and COE to manage potential threats in habitats where colonies exist on properties belonging to these agencies. Further, we are not aware of any colonies of *E. tennesseensis* that have been lost to vegetation succession.

Summary of Factor A: Because we expect that the lands containing the 19 secure and self-sustaining colonies, which accounted for approximately 83 percent of the total flowering stems estimated to exist in 2005, will remain permanently protected and will be managed to maintain cedar glade habitat and no known colonies have been lost to vegetation succession, we find that the present or threatened destruction, modification, or curtailment of its habitat or range has been effectively diminished to the point that it is no longer a threat to *Echinacea tennesseensis.*

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

The final rule to list *Echinacea tennesseensis* as endangered (44 FR 32604) identified collection for commercial and recreational purposes as a threat to the species. Limited digging, presumably for horticultural purposes, has been observed in the past at five colonies of *E. tennesseensis,* three (*i.e.,* colonies 5.3, 5.5, and 5.6) of which are located in high visibility areas within Long Hunter State Park (TDEC 1996, p. 21). We do not consider these three colonies or a fourth (*i.e.,* colony 3.5) located on private land to be secure for the purposes of this rule. We consider colony 4.2, where digging has been observed in the past, to be secure because it became a DSNA in 1998, and no evidence of digging at this site has been recorded since 1996. *Echinacea tennesseensis* that originated from natural populations, but is now grown from seed or vegetative propagules produced in nurseries, is available for interstate commerce from one nursery under the authority of the Act through a section 10(a)(1)(A) permit. These plants are also for sale by multiple nurseries only within Tennessee, thus not requiring a permit under section 10(a)(1)(A) of the Act. TDEC regulates commerce of plants listed as endangered by the State of Tennessee through issuance of permits for this purpose, as authorized by the Tennessee Rare Plant Protection Act of 1985 (T.C.A. 11–26–201). There are also at least two cultivars of *E. tennesseensis,* which are of hybrid origin, now available for interstate commerce and easily found on the Internet. We do not believe cultivars are a threat to the Tennessee purple coneflower because planting of these individuals is not allowed on public and state owned property where wild populations occur.

The genus *Echinacea* has long been used for medicinal purposes by Native Americans and is commercially available as a popular homeopathic supplement. However, the primary species used in commercial medicinal applications and studied for their medicinal properties do not include *E. tennesseensis* (Senchina *et al.* 2006, p. 1). We are not aware of collections of this species being taken for this purpose and do not believe this poses a threat to this species currently or into the foreseeable future.

Summary of Factor B: Echinacea tennesseensis and hybrids displaying the attractive traits of the species are readily available commercially, and poaching has been observed in the past at only five colonies, one of which we counted as secure in our analysis for this delisting rule because this colony became a DSNA in 1998, and no evidence of activity has occurred since 1996. In addition, *E. tennesseensis* is not among the primary species of *Echinacea* used for medicinal applications. Therefore, we find that overutilization for commercial, recreational (*i.e.,* gardening), scientific, or educational purposes is no longer a threat to *E. tennesseensis.*

Factor C. Disease or Predation

The listing rule for *Echinacea tennesseensis* (44 FR 32604) stated that light grazing occurred at colony 3.2 but acknowledged that the degree of threat, if any, posed by this grazing was uncertain. A robust population of *E. tennesseensis* remains at this site today, much of which was recently acquired by TDEC for addition to Tennessee's natural area system. Deer browse has been identified as an impact at the three colonies in Stones River National Battlefield (TDEC 1996, Appendix I, pp. XXXI–XXXIII) and at colony 5.5 (TDEC 2007, p. 5). However, we have no data

to suggest that such browsing currently threatens these colonies, which have persisted since being established by introductions 10 or more years ago.

Summary of Factor C: Because we have no data to suggest that either grazing or deer browse threaten any colonies, we find that disease or predation is not a threat to *Echinacea tennesseensis.*

Factor D. The Inadequacy of Existing Regulatory Mechanisms

When *Echinacea tennesseensis* was listed, the final rule to list *E. tennesseensis* as endangered (44 FR 32604) identified the lack of State protections as a threat to the species. *Echinacea tennesseensis* is now listed as endangered by the State of Tennessee and is protected under the Tennessee Rare Plant Protection Act of 1985 (T.C.A. 11–26–201), which forbids persons from knowingly uprooting, digging, taking, removing, damaging, destroying, possessing, or otherwise disturbing for any purpose, any endangered species from private or public lands without the written permission of the landowner. While this legislation does not forbid the destruction of *E. tennesseensis* or its habitat with landowner permission, neither does the Act afford such protection to listed plants. Regardless, as discussed in Factor A above, destruction, modification, or curtailment of its habitat or range is no longer a threat. Furthermore, those colonies located in DSNAs are afforded additional protection by the State of Tennessee's Natural Area Preservation Act of 1971 (T.C.A. 11–1701), which protects DSNAs from vandalism and forbids removal of State endangered and threatened species from these areas.

Summary of Factor D: While it is possible that the State of Tennessee could determine that *Echinacea tennesseensis* should be removed from the State's endangered plant list of Tennessee if the species is removed from the Federal List of Endangered and Threatened Plants, we believe that the protected status of the lands where the 19 secure colonies currently exist will continue to provide adequate regulatory protection for those colonies even if State delisting occurs. Therefore, we find that the inadequacy of existing regulatory mechanisms is no longer a threat to *E. tennesseensis.*

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

TDEC (1996, p. 2) identified low levels of genetic variability in *Echinacea tennesseensis* as a threat but did not report any deleterious effects of diminished genetic variability, such as inbreeding depression, that would indicate this factor poses a threat to this species. Baskauf *et al.* (1994, p. 186) documented low levels of genetic variability in *E. tennesseensis,* but also observed that this species is not devoid of genetic variability and is evidently well adapted to its cedar glade habitat. They noted that given the relatively large sizes of many of the naturally occurring populations, random genetic drift should not erode genetic variability in *E. tennesseensis* very rapidly. They suggested that dramatic population fluctuations or extinction and colonization events could have occurred historically and eroded genetic variability (Baskauf *et al.* 1994, p. 186). However, it is possible that this species might never have possessed high levels of genetic variability (Walck *et al.* 2002, p. 62). Reduction of genetic diversity could affect the viability of the introduced colonies, as they could be subject to losses in genetic variability that result from establishing colonies from a subset of the total genetic structure found in the species (*i.e.,* the founder effect) (Allendorf and Luikart 2007, p. 129). We have no information concerning the genetic structure of introduced colonies compared to naturally occurring ones, but this could be a factor to investigate if introduced colonies are found to be less stable than natural colonies through future monitoring. At this time, however, we do not believe that low genetic variability threatens *E. tennesseensis.*

The Intergovernmental Panel on Climate Change (IPCC) concluded that evidence of warming of the climate system is unequivocal (IPCC 2007a, p. 30). Numerous long-term climate changes have been observed including changes in arctic temperatures and ice, widespread changes in precipitation amounts, ocean salinity, wind patterns and aspects of extreme weather including droughts, heavy precipitation, heat waves, and the intensity of tropical cyclones (IPCC 2007b, p. 7). While continued change is certain, the magnitude and rate of change is unknown in many cases. Species that are dependent on specialized habitat types, that are limited in distribution, or that have become restricted to the extreme periphery of their range will be most susceptible to the impacts of climate change. As stated above, *Echinacea tennesseensis* is only found in limestone barrens and cedar glades habitats of the Central Basin, Interior Low Plateau Physiographic Province, in Davidson, Rutherford, and Wilson Counties in Tennessee. Within this ecosystem, *E. tennesseensis* inhabits both xeric (dry) communities, where there is no soil or soil depth less than 5 cm (2 in.) and subxeric (moderately dry) communities on soils deeper than 5 cm (2 in.).

Estimates of the effects of climate change using available climate models lack the geographic precision needed to predict the magnitude of effects at a scale small enough to discretely apply to the range of *Echinacea tennesseensis.* However, data on recent trends and predicted changes for the Southeast United States (Karl *et al.* 2009, pp. 111–116) provide some insight for evaluating the potential threat of climate change to *E. tennesseensis.* Since 1970, the average annual temperature of the region has increased by about 2 °F, with the greatest increases occurring during winter months. The geographic extent of areas in the Southeast region affected by moderate to severe spring and summer drought has increased over the past three decades by 12 and 14 percent, respectively (Karl *et al.* 2009, p. 111). These trends are expected to increase.

Rates of warming are predicted to more than double in comparison to what the Southeast has experienced since 1975, with the greatest increases projected for summer months. Depending on the emissions scenario used for modeling change, average temperatures are expected to increase by 4.5 °F to 9 °F by the 2080s (Karl *et al.* 2009, pp. 111). While there is considerable variability in rainfall predictions throughout the region, increases in evaporation of moisture from soils and loss of water by plants in response to warmer temperatures are expected to contribute to the effect of these droughts (Karl *et al.* 2009, pp. 112).

Despite the observations of Drew and Clebsch (1995, p. 66) that seedlings had an approximately 50-percent probability of dying during the drought conditions that occurred during their first year of study, we believe there is biological and historical evidence to suggest that *Echinacea tennesseensis* is well-adapted to endure predicted effects of climate change. First, Drew and Clebsch (1995, p. 66) found that stage-specific mortality rates during the drought conditions of their first year of study for non-reproductive *E. tennesseensis* plants with a cumulative leaf length greater than 30 cm (12 in) (*i.e.,* non-seedling, vegetative plants) and plants that were reproductively active ranged from 17 to 31 percent, considerably lower than rates observed in seedlings. Second, Hemmerly (1976, p. 12) found that mature plants possessed several roots

averaging 38.4 cm (15.1 in.) length and extending an average depth of 23.1 cm (9.1 in.) into the soil, often branching horizontally after reaching an impenetrable rock layer. These observations suggest that while seedlings face higher risks of mortality to drought conditions, this species possesses biological characteristics that increase drought resistance in later life-history stages. That non-seedling life stages of *E. tennesseensis* are more resilient to drought than seedlings is supported by Drew and Clebsch's (1995, p. 67) observation of demographic patterns in flowering individuals. During 1988, 41 percent of the plants that they observed flowering during 1987 failed to do so, presumably influenced by drought. However, 68 percent of those plants that failed to flower during 1988 produced flowers again during 1989, when annual rainfall levels increased. This ability to vary flower production in relation to annual rainfall levels, combined with its apparently long-lived habit (Baskauf 1993, p. 37), should enable *E. tennesseensis* to remain viable through periods of drought.

Studies examining the influence of genetic, ecological, and physiological factors on the distribution of *Echinacea tennesseensis* have not found sufficient differences between this species and more widespread congeners to explain its endemism in the cedar glades of middle Tennessee based on these factors alone (Baskin *et al.* 1997, p. 385; Baskauf and Eickmeier 1994, p. 963; Snyder *et al.* 1994, p. 64). Rather, it has been suggested that historical and ecological factors contributed to the evolution of this species and its subsequent restriction to cedar glade habitats in middle Tennessee (Baskin *et al.* 1997, p. 385). Baskin *et al.* (1997, pp. 390–391) suggested that an ancestral form of *E. tennesseensis* migrated to and became established in middle Tennessee during the Hypsithermal Interval (*i.e.,* the period of greatest post-glacial warming, ca. 8,000 to 5,000 years before present), and that as temperatures became cooler, the only members of this ancestral taxon that survived were those growing in the cedar glades of the region —*i.e.,* the plants that eventually gave rise to *E. tennesseensis.*

While predictions of increased drought frequency, intensity, and duration suggest that seedling survival could be a limiting factor for *Echinacea tennesseensis,* the species possesses other biological traits (*i.e.,* long life span, interannual reproductive variability) to provide resilience to this threat. In their analyses of life-history traits in relation to potential vulnerability to variability in demographic vital rates caused by increased variability in climatic patterns, Morris *et al.* (2008, p. 22) and Dalgleish *et al.* (2010, p. 216) concluded that longer-lived species should be less influenced by climate-driven increases in demographic variability. Further, predicted climate changes for the Southeast could, similar to what is believed to have taken place during the Hypsithermal Interval (Delcourt *et al.* 1986, p. 135), lead to an expansion of openings within forested areas of middle Tennessee, potentially increasing the area occupied by cedar glades communities. This presumably would increase the amount of suitable habitat available for *E. tennesseensis.* Based on these factors and the fact that we have no evidence that climate changes observed to date have had any adverse impact on *E. tennesseensis* or its habitat, we do not believe that climate change is a threat to *E. tennesseensis* now or within the foreseeable future.

Summary of Factor E: Because (1) management activities take place to prevent the loss of 19 secure *Echinacea tennesseensis* colonies, (2) 31 colonies are considered self-sustaining, as measured by persistence and demographic stability over time (despite low levels of genetic variation within the species), (3) there is biological and historical evidence to suggest that *E. tennesseensis* is well-adapted to endure predicted effects of climate change, and (4) we have no evidence that climate changes observed to date have had any adverse impact on *E. tennesseensis* or its habitat, we find that other natural or manmade factors considered here are no longer a threat to *E. tennesseensis.* Post delisting monitoring will also afford an opportunity to monitor the impacts of any natural events that occur, such as a drought similar to the one in 2007 and 2008, for five growing seasons to ensure that *E. tennesseensis* no longer requires protection as a listed species.

Conclusion of the 5-Factor Analysis

We have carefully assessed the best scientific and commercial information available regarding the threats faced by *Echinacea tennesseensis* in developing this rule. As identified above, site protection and habitat management efforts by TDEC, working cooperatively with TDF, TNC, COE, the Service, and private landowners, has reduced habitat loss from residential and recreational development so that it is no longer a threat. Potential effects of ORV use, illegal and otherwise, in habitats containing colonies of *E. tennesseensis* remain. While disturbance from ORV use has been observed in the past and remains unaddressed at four colonies (*i.e.,* colonies 2.4, 3.6, 3.8, and 4.3) on publicly and privately owned lands harboring *E. tennesseensis,* these four colonies accounted for only 2 percent of the species' total distribution in 2005. Most of the largest colonies are located in DSNAs and are protected from this threat by fences or other barriers that TDEC has constructed and maintained. At the time the 1989 recovery plan was written, there were five extant populations ranging in size from approximately 3,700 to 89,000 plants and consisting of one to three colonies each (Clebsch 1988, p. 14; Service 1989, p. 2). There was an estimated total of 146,000 individual plants in 1989 (Drew and Clebsch 1995, p. 62). Recovery efforts have secured habitat for 19 colonies that are self-sustaining and distributed among six geographically defined populations. These 19 secured colonies accounted for 88,773 flowering stems in 2005, or approximately 83 percent of the flowering stems observed; whereas, colonies that we do not consider secure accounted for 18,576 flowering stems, or approximately 17 percent of the flowering stems observed (TDEC 2006, pp. 4–5). The number of secured plants and colonies is adequate to ensure that Factor A is no longer a threat to the species overall. Thus, destruction and modification of habitat from ORV use is not a threat to the species throughout all its range now or into the foreseeable future.

The final rule that listed *Echinacea tennesseensis* as endangered (44 FR 32604) identified the overuse of this species for commercial or scientific (*i.e.,* medicinal) purposes as a potential threat to this species. This threat has not materialized, and we do not believe it will in the future due to the emphasis on use of three other species from the genus *Echinacea* for this purpose. Neither do livestock grazing, as identified in the listing rule, nor browse by herbivores threaten *E. tennesseensis.*

The State of Tennessee enacted the Rare Plant Protection Act of 1985, addressing the inadequacy of existing regulatory mechanisms for protecting this species at the time it was listed. Should the State of Tennessee remove *Echinacea tennesseensis* from its List of Endangered Plants, we believe that the protected status of the lands where the 19 secure colonies currently exist will continue to provide adequate regulatory protection for those colonies. Also, TDEC's program for managing vegetation succession and other threats to cedar glade habitats on DSNAs inhabited by *E. tennesseensis* and their cooperative efforts with TDF, Tennessee

State Parks, and COE to manage threats in habitats where colonies exist on properties under their jurisdictions have been effective in maintaining habitats in the absence of disturbances from ORV activity.

Baskauf *et al.* (1994, p. 186) documented low levels of genetic variability in *Echinacea tennesseensis,* but also observed that this species is not devoid of genetic variability and is evidently well adapted to its cedar glade habitat. They noted that given the relatively large sizes of many of the naturally occurring populations, random genetic drift should not erode genetic variability in *E. tennesseensis* very rapidly. We do not believe that low genetic variability threatens *E. tennesseensis* now or within the foreseeable future.

Based on biological evidence and historical factors discussed above in relation to the potential threat of climate change, and the fact that we have no evidence that climate changes observed to date have had any adverse impact on *Echinacea tennesseensis* or its habitat, we do not believe that climate change is a threat to *E. tennesseensis* now or within the foreseeable future.

With respect to *Echinacea tennesseensis,* we have sufficient evidence (see Summary of Factors Affecting the Species section above) to show that all of the threats identified at or since the time of listing are no longer significant threats to the species, and are not likely to become threats in the foreseeable future. We believe that the 19 secure, self-sustaining colonies distributed among six populations are secure for the foreseeable future from the threats currently affecting the species and those identified at the time of listing. These 19 colonies are located on protected conservation lands, the long-term management of which we believe precludes threats due to residential or recreational development and succession of cedar glade communities for the foreseeable future. Based on the analysis above and given the reduction in threats, *Echinacea tennesseensis* does not currently meet the Act's definition of endangered in that it is not in danger of extinction throughout all of its range, nor the definition of threatened in that it is not likely to become endangered in the foreseeable future throughout all its range.

Significant Portion of the Range Analysis

Having determined that *Echinacea tennesseensis* does not meet the definition of endangered or threatened throughout its range, we must next consider whether there are any significant portions of its range that are in danger of extinction or likely to become endangered. A portion of a species' range is significant if it is part of the current range of the species and is important to the conservation of the species as evaluated based upon its representation, resiliency, or redundancy.

If we identify any portions of a species' range that warrant further consideration, we then determine whether in fact the species is endangered or threatened in any significant portion of its range. Depending on the biology of the species, its range, and the threats it faces, it may be more efficient for the Service to address the significance question first and in others the status question first. Thus, if the Service determines that a portion of the range is not significant, the Service need not determine whether the species is endangered or threatened there. If the Service determines that the species is not endangered or threatened in a portion of its range, the Service need not determine if that portion is significant.

For *Echinacea tennesseensis,* we applied the process described above to determine whether any portions of the range warranted further consideration. The potential threats identified above are fairly uniform throughout the range of the species; however, they are more pronounced on privately owned lands where the species occurs. As discussed above, a portion of a species' range is significant if it is part of the current range of the species and is important to the conservation of the species because it contributes meaningfully to the representation, resiliency, or redundancy of the species. The contribution must be at a level such that its loss would result in a decrease in the ability to conserve the species. While there is some variability in the habitats occupied by *E. tennesseensis* across its range, the basic ecological components required for the species to complete its life cycle are present throughout the habitats occupied by the six populations. No specific location within the current range of the species provides a unique or biologically significant function that is not found in other portions of the range. The currently occupied range of *E. tennesseensis* encompasses approximately 400 km^2 (154 mi^2) in Davidson, Rutherford, and Wilson Counties, Tennessee. We have determined that 19 secure and self-sustaining colonies presently are distributed among the six populations of *E. tennesseensis,* which accounted for approximately 83 percent of the total individuals estimated to exist in 2005. Sixteen additional colonies account for the remaining 17 percent of the total individuals estimated to exist in 2005 and are not considered secure. However, we do not consider these unsecured colonies to be a significant portion of the range of this species because these colonies provide no unique or biologically significant function that is not provided by the 19 secured and self-sustaining colonies.

In conclusion, major threats to *Echinacea tennesseensis* have been reduced, managed, or eliminated. Although the impacts to *E. tennesseensis* habitat are fairly uniform throughout the range of the species, they are more pronounced on privately owned lands where the species occurs. However, we do not consider these unsecured colonies to be a significant portion of the range of this species. Therefore, we have determined that *E. tennesseensis* is not in danger of becoming extinct throughout all or a significant portion of its range nor is it likely to become endangered now or within the foreseeable future throughout all or any significant portion of its range. On the basis of this evaluation, we believe *E. tennesseensis* no longer requires the protection of the Act, and we remove *E. tennesseensis* from the Federal List of Endangered and Threatened Plants (50 CFR 17.12(h)).

Effect of This Rule

This rule will revise 50 CFR 17.12(h) to remove *Echinacea tennesseensis* from the List of Endangered and Threatened Plants. Because no critical habitat was ever designated for this species, this rule will not affect 50 CFR 17.96.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered plants. The prohibitions under section 9(a)(2) of the Act make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, remove and reduce *Echinacea tennesseensis* to possession from areas under Federal jurisdiction, or remove, cut, dig up, or damage or destroy *E. tennesseensis* on any other area in knowing violation of any State law or regulation such as a trespass law. Section 7 of the Act requires that Federal agencies consult with us to ensure that any action authorized, funded, or carried out by them is not likely to jeopardize the species' continued existence. This rule will revise 50 CFR 17.12(h) to remove

(delist) *E. tennesseensis* from the Federal List of Endangered and Threatened Plants and these prohibitions would no longer apply. Delisting *E. tennesseensis* is expected to have positive effects in terms of increasing management flexibility by State and Federal governments.

Post-Delisting Monitoring

Section 4(g)(1) of the Act requires us to monitor for at least 5 years species that are delisted due to recovery. Post-delisting monitoring refers to activities undertaken to verify that a species delisted due to recovery remains secure from the risk of extinction after the protections of the Act no longer apply. The primary goal of post-delisting monitoring is to monitor the species so that its status does not deteriorate, and if a decline is detected, to take measures to halt the decline so that proposing it as endangered or threatened is not again needed. If at any time during the monitoring period, data indicate that protective status under the Act should be reinstated, we can initiate listing procedures, including, if appropriate, emergency listing.

Section 4(g) of the Act explicitly requires cooperation with the States in development and implementation of post-delisting monitoring programs, but we remain responsible for compliance with section 4(g) and, therefore, must remain actively engaged in all phases of post-delisting monitoring. We also seek active participation of other entities that are expected to assume responsibilities for the species' conservation after delisting. In August 2008, TDEC agreed to be a cooperator in the post-delisting monitoring of *E. tennesseensis.*

We have finalized a Post-Delisting Monitoring Plan (Plan) for *Echinacea tennesseensis* (USFWS 2011, entire). The Plan: (1) Summarizes the species' status at the time of delisting; (2) defines thresholds or triggers for potential monitoring outcomes and conclusions; (3) lays out frequency and duration of monitoring; (4) articulates monitoring methods, including sampling considerations; (5) outlines data compilation and reporting procedures and responsibilities; and (6) depicts a post-delisting monitoring implementation schedule, including timing and responsible parties.

Required Determinations

Paperwork Reduction Act of 1995

OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. The OMB regulations at 5 CFR 1320.3(c) define a collection of information as the obtaining of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, 10 or more persons. Furthermore, 5 CFR 1320.3(c)(4) specifies that ''ten or more persons'' refers to the persons to whom a collection of information is addressed by the agency within any 12-month period. For purposes of this definition, employees of the Federal government are not included. This rule and our final Post-Delisting Monitoring Plan do not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have determined that we do not need to prepare an environmental assessment or environmental impact statement, as defined in the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of 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. We have determined that there are no Tribal lands affected by this rule.

References Cited

A complete list of references cited is available on *http://www.regulations.gov* under docket number FWS–R4–ES–2010–0059.

Author

The primary author of this document is Geoff Call, Tennessee Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

Accordingly, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 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.

§ 17.12 [Amended]

■ 2. Amend § 17.12(h) by removing the entry for ''*Echinacea tennesseensis*'' under ''FLOWERING PLANTS'' from the List of Endangered and Threatened Plants.

Dated: July 21, 2011.

Gregory E. Siekaniec,

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

[FR Doc. 2011–19674 Filed 8–2–11; 8:45 am]

BILLING CODE 4310–55–P

Proposed Rules

Federal Register
Vol. 76, No. 149
Wednesday, August 3, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 923

[Doc. No. AMS–FV–11–0059; FV11–923–1 CR]

Sweet Cherries Grown in Designated Counties in Washington; Continuance Referendum

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Referendum order.

SUMMARY: This document directs that a referendum be conducted among eligible Washington sweet cherry growers to determine whether they favor continuance of the marketing order regulating the handling of sweet cherries grown in designated counties in Washington.

DATES: The referendum will be conducted from November 5 through November 18, 2011. To vote in this referendum, growers must have grown sweet cherries in designated counties in Washington during the period April 1, 2010, through March 31, 2011.

ADDRESSES: Copies of the marketing order may be obtained from the Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, U.S. Department of Agriculture, 805 SW. Broadway, Suite 930, Portland, Oregon 97205, or the Office of the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237.

FOR FURTHER INFORMATION CONTACT: Teresa Hutchinson, Marketing Specialist, or Gary D. Olson, Regional Manager, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; *Telephone:* (503) 326–2724, *Fax:* (503) 326–7440, or *E-mail: Teresa.Hutchinson@ams.usda.gov* or *GaryD.Olson@ams.usda.gov,* respectively.

SUPPLEMENTARY INFORMATION: Pursuant to Marketing Order No. 923 (7 CFR part 923), hereinafter referred to as the ''order,'' and the applicable provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act,'' it is hereby directed that a referendum be conducted to ascertain whether continuance of the order is favored by growers. The referendum shall be conducted from November 5 through November 18, 2011, among eligible Washington sweet cherry growers. Only growers that were engaged in the production of sweet cherries in designated counties in Washington during the period of April 1, 2010, through March 31, 2011, may participate in the continuance referendum.

USDA has determined that continuance referenda are an effective means for determining whether growers favor the continuation of marketing order programs. USDA would consider termination of the order if fewer than two-thirds of the growers voting in the referendum and growers of less than two-thirds of the volume of Washington sweet cherries represented in the referendum favor continuance of the program. In evaluating the merits of continuance versus termination, USDA will not exclusively consider the results of the continuance referendum. USDA will also consider all other relevant information regarding operation of the order as well as relative benefits and disadvantages to growers, handlers, and consumers to determine whether continuing the order would tend to effectuate the declared policy of the Act.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the ballot materials used in the referendum herein ordered have been submitted to and approved by the Office of Management and Budget (OMB) and have been assigned OMB No. 0581–0189, Generic Fruit Crops. It has been estimated that it will take an average of 20 minutes for each of the approximately 2500 Washington sweet cherry growers to cast a ballot. Participation is voluntary. Ballots postmarked after November 18, 2011, will not be included in the vote tabulation.

Teresa L. Hutchinson and Gary D. Olson of the Northwest Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, are hereby designated as the referendum agents of the Secretary of Agriculture to conduct this referendum. The procedure applicable to the referendum shall be the ''Procedure for the Conduct of Referenda in Connection With Marketing Orders for Fruits, Vegetables, and Nuts Pursuant to the Agricultural Marketing Agreement Act of 1937, as Amended'' (7 CFR 900.400–900.407).

Ballots will be mailed to all growers of record and may also be obtained from the referendum agents or from their appointees.

List of Subjects in 7 CFR Part 923

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

Authority: 7 U.S.C. 601–674.

Dated: July 28, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–19654 Filed 8–2–11; 8:45 am]

BILLING CODE 3410–02–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 26

[Docket No. PRM–26–4; NRC–2010–0269]

Petition for Rulemaking Submitted by the California Association of Marriage and Family Therapists

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking: consideration in the rulemaking process.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has decided to consider in a rulemaking the issues raised in a petition for rulemaking (PRM) submitted by Ms. Mary Riemersma, on behalf of the California Association of Marriage and Family Therapists (the petitioner) (Docket ID PRM–26–4, NRC–2010–0269). The petitioner asked the NRC to amend the regulations at Title 10 of the *Code of Federal Regulations* (10 CFR) 26.187(b) to add marriage and family therapists as substance abuse experts.

ADDRESSES: Further NRC action on the issues raised by this petition can be found on the Federal rulemaking Web site at *http://www.regulations.gov* by searching on Docket ID: NRC–2011–0137 which is the identification for the future rulemaking.

You can access publicly available documents related to the petition using the following methods:

• *The NRC's Public Document Room (PDR).* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852.

• *The NRC's Agencywide Documents Access and Management System (ADAMS).* Publicly available documents created or received at the NRC are available electronically at the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can access ADAMS to obtain text and image files of the NRC's public documents. If you do not have access to ADAMS or if you have problems accessing the documents located in ADAMS, contact the NRC's PDR reference staff by telephone at 1–800–397–4209 or 301–415–4737 or by e-mail to *PDR.Resource@nrc.gov.*

• *Federal Rulemaking Web Site.* Public comments and supporting materials related to this petition can be found at *http://www.regulations.gov* by searching on the rulemaking Docket ID PRM–26–4, NRC–2010–0269. Address questions about NRC dockets to Carol Gallagher by telephone at 301–492–3668 or by e-mail to *carol.gallagher@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Anthony W. Markley, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *telephone:* 301–415–3165, e-mail to *anthony.markley@nrc.gov.*

SUPPLEMENTARY INFORMATION: On August 24, 2010 (75 FR 51958), the NRC published a notice of receipt of a PRM filed by the California Association of Marriage and Family Therapists and a request for public comment. The comment period closed on November 8, 2010, and the NRC received no comments.

The NRC determined that the issues raised in PRM–26–4 are appropriate for consideration and will address them in a future rulemaking. Docket ID PRM–26–4 is closed.

Dated at Rockville, Maryland, this 14th day of July 2011.

For the Nuclear Regulatory Commission.

Darren B. Ash,

Acting Executive Director for Operations.

[FR Doc. 2011–19639 Filed 8–2–11; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 240

[Docket No. R–1428]

RIN 7100–AD 79

Retail Foreign Exchange Transactions (Regulation NN)

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (''Board'') is publishing for comment a regulation to permit banking organizations under its supervision to engage in off-exchange transactions in foreign currency with retail customers. The proposed rule also describes various requirements with which banking organizations must comply to conduct such transactions.

DATES: Comments on this notice of proposed rulemaking must be received by October 11, 2011.

ADDRESSES: You may submit comments identified by Docket No. R–1428 and RIN No. 7100–AD 79, by using any of the methods below. Please submit your comments using only one method.

Agency Web Site: http://www.federalreserve.gov. Follow the instructions for submitting comments at *htpp://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 docket number in the subject line of the message.

Facsimile: (202) 452–3819 or (202) 452–3102.

Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *htpp://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Scott Holz, Senior Counsel, Legal Division, (202) 452–2966.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[1] As amended by section 742(c)(2) of the Dodd-Frank Act,[2] the Commodity Exchange Act (CEA) provides that a United States financial institution [3] for which there is a Federal regulatory agency [4] shall not enter into, or offer to enter into, certain types of foreign exchange transactions described in section 2(c)(2)(B)(i)(I) of the CEA with a retail customer [5] except pursuant to a rule or regulation of a Federal regulatory agency allowing the transaction under such terms and conditions as the Federal regulatory agency shall prescribe [6] (a ''retail forex rule''). Section 2(c)(2)(B)(i)(I) includes ''an agreement, contract, or transaction in foreign currency that * * * is a contract of sale of a commodity for future delivery (or an option on such a contract) or an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)).'' [7] A Federal regulatory agency's retail forex rule must treat all such futures and options and all agreements, contracts, or transactions that are functionally or economically similar to such futures and options similarly.[8]

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[1] Public Law 111–203, 124 Stat. 1376.

[2] Dodd-Frank Act § 742(c)(2) (to be codified at 7 U.S.C. 2(c)(2)(E)). In this preamble, citations to the retail forex statutory provisions will be the section where the provisions will be codified in the Commodity Exchange Act.

[3] The CEA defines ''financial institution'' to include an agreement corporation, an Edge Act corporation, a depository institution (as defined in section 3 of the Federal Deposit Insurance Act), a financial holding company (as defined in section 2 of the Bank Holding Company Act of 1956), a trust company, or ''a similarly regulated subsidiary or affiliate of an entity'' described above. 7 U.S.C. 1a(21).

[4] For purposes of the retail forex rules, ''Federal regulatory agency'' includes ''an appropriate Federal banking agency.'' 7 U.S.C. 2(c)(2)(E)(i)(III). The Board is an ''appropriate Federal banking agency'' under the CEA. 7 U.S.C. 1a(2).

[5] A retail customer is a person who is not an ''eligible contract participant'' under the CEA. *See,* 7 U.S.C. 1a(18).

[6] 7 U.S.C. 2(c)(2)(E)(ii)(I).

[7] 7 U.S.C. 2(c)(2)(B)(i)(I).

[8] 7 U.S.C. 2(c)(2)(E)(iii)(II).

Retail forex rules must prescribe appropriate requirements with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation requirements, and may include such other standards or requirements as the Federal regulatory agency determines to be necessary.[9] This Dodd-Frank Act amendment to the CEA takes effect 360 days from the enactment of the Act.[10] Therefore, as of July 16, 2011, state member banks, uninsured state-licensed branches of foreign banks, financial holding companies, bank holding companies, agreement corporations, and Edge Act corporations (collectively, banking institutions) may not engage in a retail forex transaction except pursuant to a retail forex rule issued by the Board.

On September 10, 2010, the Commodity Futures Trading Commission (CFTC) adopted a retail forex rule for persons subject to its jurisdiction.[11] After studying and considering the CFTC's retail forex rule, and being mindful of the desirability of issuing comparable rules, the Board is proposing to adopt a substantially similar rule for banking institutions wishing to engage in retail forex transactions. The Dodd-Frank Act does not require that retail forex rules be issued jointly, or on a coordinated basis, with any other Federal regulatory agency. The Federal banking agencies (the Board, Office of the Comptroller of the Currency (OCC), and Federal Deposit Insurance Corporation (FDIC)) have consulted with each other and generally agree on their respective approaches to regulating retail forex transactions. However, each banking agency is issuing separate rules.[12]

The retail forex rule proposed today provides for banking institutions to notify the Board before engaging in retail forex transactions. It would also require that such banking institutions generally be ''well-capitalized,'' and it would prohibit fraudulent transactions and unlawful representations in connection with this business. The rule would require customers be given a standardized risk disclosure statement before engaging in retail forex transactions, along with a calculation of the number of profitable retail forex accounts maintained by the banking institution in the past year. The rule would impose customer margin requirements, and require confirmations and monthly statements be provided to the customer. Recordkeeping requirements are specified for the banking institution, along with certain trading and operational standards.

The Board's proposed retail forex rule is modeled on the CFTC's retail forex rule to promote consistent treatment of retail forex transactions regardless of whether a retail forex customer's dealer is a banking institution or a CFTC registrant. The proposal includes various changes that reflect differences between Board and CFTC supervisory regimes and differences between banking organizations and CFTC registrants. For example:

- The Board's proposed retail forex rule leverages the Board's existing comprehensive supervision of banking institutions. For example, the Board's proposed retail forex rule does not include registration requirements, because banking institutions are already subject to comprehensive supervision by the Board. Thus, instead of a registration requirement, banking institutions must provide 60 days notice to the Board to conduct a retail forex business.
- Because banking institutions are already subject to various capital and other supervisory requirements,[13] the Board's proposed retail forex rule generally requires banking institutions wishing to engage in retail forex transactions to be ''well capitalized.''
- The proposed rule would require that the risk disclosure statement highlight that a retail forex transaction is not insured by the FDIC. The CFTC's regulations do not address FDIC insurance because no financial intermediaries under the CFTC's jurisdiction are insured depository institutions.

The Board has consulted with the OCC and FDIC in preparing its proposed retail forex regulation. Although the Board's proposed rule is substantially similar to the OCC's and FDIC's rules, there are some differences between the Board's proposal and the rules adopted by the other two bank regulatory agencies. For example:

- The Board's proposed rule would not prohibit a bank from exercising a right of set off, *i.e.,* applying a retail forex customer's losses or margin call against other assets of the customer held by bank other than money or property given as margin. The OCC and FDIC have adopted rules to prohibit retail forex dealers under their supervision from exercising a right of set off and have further required that retail forex customer margin be held in a separate account that holds only retail forex margin. The Board is not proposing to require a separate retail forex margin account, but is requesting comment on whether these prohibitions would be appropriate.
- The Board's proposed rule would bar the use of mandatory pre-dispute arbitration agreements. The CFTC and the OCC have adopted rules that permit pre-dispute arbitration agreements, while the FDIC has adopted a prohibition similar to the one being proposed by the Board. The Board is requesting comment on whether such agreements should be permitted.

II. Section-by-Section Description of the Rule

While many sections contain questions for commenters, the Board invites comments on all aspects of the proposed rule.

Section 240.1—Authority, Purpose, and Scope

This section authorizes a banking institution to conduct retail forex transactions.

The Board notes that some state member banks may also engage in retail forex transactions through their foreign branches. The CEA does not clearly define whether foreign branches or subsidiaries of state member banks and foreign subsidiaries of bank holding companies and financial holding companies may be considered United States financial institutions that can be included in the scope of this proposed rule. The proposed retail forex rule would define the term ''banking institution'' to include entities organized under the laws of the United States or under the laws of any U.S. state, and any branch or office of that entity, wherever located. After receiving comments on their proposed rules, the OCC and FDIC have adopted retail forex rules that exempt foreign branches of national and state nonmember banks when they engage in retail forex transactions with non-U.S. customers. This allows foreign branches dealing with non-U.S. customers to apply only those disclosure, recordkeeping, capital, margin, reporting, business conduct, documentation and other requirements of foreign law applicable to the branch, while affording U.S. customers the protections of a retail forex regulation

[9] 7 U.S.C. 2(c)(2)(E)(iii)(I).

[10] *See* Dodd-Frank Act § 754.

[11] *Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries,* 75 FR 55409 (Sept. 10, 2010) (Final CFTC Retail Forex Rule). The CFTC proposed these rules prior to the enactment of the Dodd-Frank Act. *Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries,* 75 FR 3281 (Jan. 20, 2010) (Proposed CFTC Retail Forex Rule).

[12] The OCC's proposed rule was published on April 22, 2011 (76 FR 22633); its final rule was published on July 14, 2011 (76 FR 41375). The FDIC's proposed rule was published on May 17, 2011 (76 FR 28358); its final rule was published on July 12, 2011 (76 FR 40779).

[13] *See, e.g.,* 12 CFR parts 208, 211, and 225.

adopted pursuant to the Dodd-Frank Act. The Board is proposing to adopt this exemption as well. The Board's proposed rule would also include U.S. subsidiaries of banking institutions, except for those for which there is another federal regulatory agency authorized to prescribe rules or regulations under section 2(c)(2)(E) of the CEA.[14] The term ''banking institution'' would not include entities organized under the laws of a foreign country. Therefore, foreign branches of state member banks, as well as foreign offices of U.S. bank holding companies and financial holding companies would be subject to the proposed rule when dealing with U.S. customers. Subsidiaries of a banking institution that are organized under foreign law would not be covered regardless of the customer's nationality.

Question II.1.1: The Board requests comment on whether this rule should apply to foreign branches of state member banks, or bank holding companies and financial holding companies conducting retail forex transactions abroad through entities organized under the laws of the United States, and whether this rule should apply to transactions with U.S. or foreign customers.

Section 240.2—Definitions

This section proposes definitions of terms specific to retail forex transactions and to the regulatory requirements that apply to retail forex transactions.

The definition of ''retail forex transaction'' generally includes the following transactions in foreign currency between a banking institution and a person that is not an eligible contract participant: [15] (i) A future or option on such a future; [16] (ii) options not traded on a registered national securities exchange; [17] and (iii) certain leveraged or margined transactions. This definition has several important features.

First, certain transactions in foreign currency are not ''retail forex transactions,'' and therefore are not subject to the prohibition in section 742(c)(2) of the Dodd-Frank Act. For example, a ''spot'' forex transaction where one currency is bought for another and the two currencies are exchanged within two days is not a ''future'' and would not meet the definition of a ''retail forex transaction,'' since actual delivery occurs as soon as practicable.[18] Similarly, a ''retail forex transaction'' does not include a forward contract with a commercial entity that creates an enforceable obligation to make or take delivery, provided the commercial counterparty has the ability to make delivery and accept delivery in connection with its line of business.[19] In addition, ''retail forex transaction'' does not include an ''identified banking product'' or a part of an ''identified banking product,'' as defined in section 401(b) of the Legal Certainty for Bank Product Act of 2000.[20] Finally, the definition does not include transactions executed on an exchange or designated contract market.

Second, the proposal would cover rolling spot forex transactions (so-called *Zelener* [21] contracts), including without limitation such transactions traded on the Internet, through a mobile phone, or on an electronic platform. A rolling spot forex transaction normally requires delivery of currency within two days, like spot transactions. However, in practice, these contracts are indefinitely renewed every other day and no currency is actually delivered until one party affirmatively closes out the position.[22] Therefore, the contracts are economically more like futures than spot contracts, although some courts have held them to be spot contracts in form.[23] For this reason, the proposal regulates these rolling spot forex transactions as retail forex transactions when conducted with a person that is not an eligible contract participant.

This section defines several terms by reference to the CEA, including ''eligible contract participant.'' Foreign currency transactions with eligible contract participants are not considered retail forex transactions and are therefore not subject to this rule. The proposed definition covers a variety of financial entities, governmental entities, certain businesses, and individuals that meet certain investment thresholds.[24]

Question II.2.2: Does the Commodity Exchange Act's definition of ''eligible contract participant'' appropriately capture who is not a retail customer for purposes of this proposed rule? Should the Board expand the definition of retail forex customer to include persons who are eligible contract participants? If so, which eligible contract participants should be considered retail forex customers?

Section 240.3—Prohibited Transactions

This section prohibits a banking institution and its related persons from

[14] 7 U.S.C. 2(c)(2)(E).

[15] The definition of ''eligible contract participant'' is found in section 1a(18) of the CEA and is discussed below.

[16] 7 U.S.C. 2(c)(2)(B)(i)(I).

[17] 7 U.S.C. 2(c)(2)(B)(i)(I).

[18] *See generally, CFTC* v. *Int'l Fin. Servs. (New York), Inc.,* 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004) (distinguishing between foreign exchange futures contracts and spot contracts in foreign exchange, and noting that foreign currency trades settled within two days are ordinarily spot transactions rather than futures contracts); *see also Bank Brussels Lambert* v. *Intermetals Corp.,* 779 F. Supp. 741, 748 (S.D.N.Y. 1991).

[19] *See generally, CFTC* v. *Int'l Fin. Servs. (New York), Inc.,* 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004) (distinguishing between forward contracts in foreign exchange and foreign exchange futures contracts); *see also* William L. Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act,* 41 Vand. L. Rev. 473, 491 (1988). In contrast to forward contracts, futures contracts generally include several or all of the following characteristics: (i) Standardized nonnegotiable terms (other than price and quantity); (ii) parties are required to deposit initial margin to secure their obligations under the contract; (iii) parties are obligated and entitled to pay or receive variation margin in the amount of gain or loss on the position periodically over the period the contract is outstanding; (iv) purchasers and sellers are permitted to close out their positions by selling or purchasing offsetting contracts; and (v) settlement may be provided for by either (a) Cash payment through a clearing entity that acts as the counterparty to both sides of the contract without delivery of the underlying commodity; or (b) physical delivery of the underlying commodity. See, Edward F. Greene *et al., U.S. Regulation of International Securities and Derivatives Markets* § 14.08[2] (8th ed. 2006).

[20] 7 U.S.C. 27(b).

[21] *CFTC* v. *Zelener,* 373 F.3d 861 (7th Cir. 2004); *see* also *CFTC* v. *Erskine,* 512 F.3rd 309 (6th Cir. 2008).

[22] For example, in *Zelener,* the retail forex dealer retained the right, at the date of delivery of the currency to deliver the currency, roll the transaction over, or offset all or a portion of the transaction with another open position held by the customer. *See CFTC* v. *Zelener,* 373 F.3d 861, 869 (7th Cir. 2004).

[23] *See, e.g., CFTC* v. *Erskine,* 512 F.3d 309, 326 (6th Cir. 2008); *CFTC* v. *Zelener,* 373 F.3d 861, 869 (7th Cir. 2004).

[24] The term ''eligible contract participant'' is defined at 7 U.S.C. 1a(18), and for purposes most relevant to this proposed rule generally includes:

(a) A corporation, partnership, proprietorship, organization, trust, or other entity—

(1) That has total assets exceeding $10,000,000;

(2) The obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by certain other eligible contract participants; or

(3) That—

(i) Has a net worth exceeding $1,000,000; and

(ii) Enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business;

(b) Subject to certain exclusions,

(1) A governmental entity (including the United States, a State, or a foreign government) or political subdivision of a governmental entity;

(2) A multinational or supranational governmental entity; or

(3) An instrumentality, agency or department of an entity described in (b)(1) or (2); and

(c) An individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of—

(1) $10,000,000; or

(2) $5,000,000 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual.

engaging in fraudulent conduct in connection with retail forex transactions. This section also addresses potential conflicts of interest by prohibiting a banking institution from acting as a counterparty to a retail forex transaction if the banking institution or its affiliate exercises discretion over the customer's retail forex account.

This section uses wording that is somewhat different from that used by the CFTC, OCC and FDIC. First, the Board's proposal prohibits a banking institution from defrauding or attempting to defraud a person, while the other regulators use the phrase ''cheat or defraud or attempt to cheat or defraud a person.'' The Board believes that ''cheat'' is synonymous with ''defraud'' and has used only the term ''defraud'' in the proposed rule. Second, the Board's proposal would prohibit a banking institution from ''knowingly'' making a false report or deceiving a person, while the other regulators prohibit their retail forex dealers from ''willfully'' engaging in these activities. The Board believes that ''knowingly'' sets a more appropriate standard of proof.

Question II.3.1: Does the prohibition on ''cheating'' in other retail forex rules add protections not contained in the Board's proposal? Does the use of ''knowingly'' instead of ''willfully'' set the appropriate standard to protect retail forex customers?

Section 240.4—Notification

This section requires a banking institution to notify the Board prior to engaging in a retail forex business. This notice would include information on customer due diligence (including credit evaluations, customer appropriateness, and ''know your customer'' documentation); new product approvals; haircuts for noncash margin; and conflicts of interest. In addition, the banking institution must certify that it has adequate written policies, procedures, and risk measurement and management systems and controls to engage in a retail forex business in a safe and sound manner and in compliance with the requirements of the Board's retail forex rule. Once a banking institution has notified the Board pursuant to this provision, the Board will have sixty days to seek additional information or object to the notification in writing, or the notification will be deemed effective. If the Board asks for additional information, the notice will become effective sixty days after all the information requested is received by the Board, unless the Board objects in writing.

Banking institutions engaged in retail forex transactions as of the effective date of this rule who promptly notify the Board will have six months, or a longer period provided by the Board, to bring their operations into conformance with the rule. Under this rule, a banking institution that notifies the Board within 30 days of the effective date of the final retail forex rule, subject to an extension by the Board, and submits the information requested by the Board thereafter will be deemed to be operating its retail forex business pursuant to a rule or regulation of a Federal regulatory agency, as required under the Commodity Exchange Act, for such period.[25]

A banking institution need not join a futures self-regulatory organization as a condition of conducting a retail forex business.

Section 240.5—Application and Closing Out of Offsetting Long and Short Positions

This section requires a banking institution to close out offsetting long and short positions in a retail forex account. The banking institution would have to offset such positions regardless of whether the customer has instructed otherwise. The CFTC concluded that ''keeping open long and short positions in a retail forex customer's account removes the opportunity for the customer to profit on the transactions, increases the fees paid by the customer and invites abuse.'' [26] Under the proposal, a banking institution may offset retail forex transactions as instructed by the retail forex customer or the customer's agent (other than the banking institution itself).

Section 240.6—Disclosure

This section requires a banking institution to provide retail forex customers with a risk disclosure statement similar to the one required by the CFTC's retail forex rule, but tailored to address certain unique characteristics of retail forex in banking institutions. The prescribed risk disclosure statement would describe the risks associated with retail forex transactions. The disclosure statement would make clear that a banking institution that wishes to use the right of set off to collect margin for or cover losses arising out of retail forex transactions must include this right in the risk disclosure statement and obtain separate written acknowledgement (See discussion of set-off below in section 240.9).

In its retail forex rule, the CFTC requires its registrants to disclose to retail customers the percentage of retail forex accounts that earned a profit, and the percentage of such accounts that experienced a loss, during each of the most recent four calendar quarters.[27] The CFTC initially explained that ''the vast majority of retail customers who enter these transactions do so solely for speculative purposes, and that relatively few of these participants trade profitably.'' [28] In its final rule, the CFTC found this requirement appropriate to protect retail customers from ''inherent conflicts embedded in the operations of the retail over-the-counter forex industry.'' [29] The Board's proposed rule requires this disclosure; however, the Board invites comments regarding this approach.

Question II.6.1: Does this disclosure provide meaningful information to retail customers of banking institutions? Would alternative disclosures more effectively accomplish the objectives of the disclosure?

Similarly, the CFTC's retail forex rule requires a disclosure that states that the dealer makes money on such trades, in addition to any fees, commissions, or spreads, even when a retail customer loses money trading.[30] The proposed rule includes this disclosure requirement.

Question II.6.2: Does this disclosure provide meaningful information to retail customers of banking institutions? Would alternative disclosures more effectively accomplish the objectives of the disclosure?

As proposed, the risk disclosure must be provided as a separate document.

Question II.6.3: Should banking institutions be allowed to combine the retail forex risk disclosure with other disclosures that banking institutions make to their customers? Or would combining disclosures diminish the impact of the retail forex disclosure?

Question II.6.4: Should the rule require disclosure of the fees the banking institution charges retail forex customers for retail forex transactions? What fees do banking institutions currently charge retail forex customers for retail forex transactions? Are there other costs to retail forex customers of engaging in retail forex transactions that banking institutions should disclose? If so, what are these costs?

[25] 7 U.S.C. 2(c)(2)(E)(ii)(I).

[26] Proposed CFTC Retail Forex Rule, 75 FR at 3287 n.54.

[27] 17 CFR 5.5(e)(1).

[28] Proposed CFTC Retail Forex Rule, 75 FR at 3289.

[29] Final CFTC Retail Forex Rule, 75 FR at 55412.

[30] 17 CFR 5.5(b).

Section 240.7—Recordkeeping

This section specifies which documents and records a banking institution engaged in retail forex transactions must retain for examination by the Board. Banking institutions are required to maintain retail forex account records, financial ledgers, transactions records, daily records, order tickets, and records showing allocations and noncash margin, as well as records relating to possible violations of law. This section also prescribes document maintenance standards, including the manner and length of maintenance. Finally, this section requires banking institutions to record and maintain transaction records and make them available to customers.

Section 240.8—Capital Requirements

This proposal does not amend the Board's regulations regarding capital. This section generally requires that a banking institution that offers or enters into retail forex transactions must be ''well capitalized'' as defined in the Board's Regulations H or Y [31] or the banking institution must obtain an exemption from the Board. An uninsured state-licensed U.S. branch or agency of a foreign bank must apply the capital rules that are made applicable to it pursuant to section 225.2(r)(3) of the Board's Regulation Y.[32] An Edge corporation or agreement corporation must comply with the capital adequacy guidelines that are made applicable to an Edge corporation engaged in banking pursuant to section 211.12(c)(2) of the Board's Regulation K.[33]

In addition, a banking institution must continue to hold capital against retail forex transactions as provided in the Board's regulations.

Section 240.9—Margin Requirements

Paragraph (a) requires a banking institution that engages in retail forex transactions, in advance of any such transaction, to collect from the retail forex customer margin equal to at least two percent of the notional value of the retail forex transaction if the transaction is in a major currency pair, and at least five percent of the notional value of the retail forex transaction otherwise. These margin requirements are identical to the requirements imposed by the CFTC's retail forex rule. A major currency pair is a currency pair with two major currencies. Under the proposal, the major currencies would be the U.S. Dollar (USD), Canadian Dollar (CAD), Euro (EUR), United Kingdom Pound (GBP), Japanese Yen (JPY), Swiss franc (CHF), New Zealand Dollar (NZD), Australian Dollar (AUD), Swedish Kronor (SEK), Danish Kroner (DKK), and Norwegian Krone (NOK),[34] or any other currency as determined by the Board.

Question II.9.1: The Board requests comment on whether this list of major currencies is appropriate and how the Board should identify a major currency or major currency pair.

Prior to the CFTC's rule, non-bank dealers routinely permitted customers to trade with 1 percent margin (leverage of 100:1) and sometimes with as little as 0.25 percent margin (leverage of 400:1). When the CFTC proposed its retail forex rule in January 2010, it proposed a margin requirement of 10 percent (leverage of 10:1). In response to comments, the CFTC reduced the required margin in the final rule to 2 percent (leverage of 50:1) for trades involving major currencies and 5 percent (leverage of 20:1) for trades involving non-major currencies.

Question II.9.2: The Board's proposed rule would adopt the margin requirements adopted in final by the CFTC. The Board invites comments on whether the requirements should be adjusted and if so, how.

Paragraph (b) specifies the acceptable forms of margin that customers may post. Under the proposal, banking institutions must establish policies and procedures providing for haircuts for noncash margin collected from customers and must review these haircuts annually. It may be prudent for banking institutions to review and modify the size of the haircuts more frequently.

Question II.9.3: Should the Board specify haircuts for noncash margin posted for retail forex transactions? If so, how should those haircuts be determined?

Paragraph (c) requires a banking institution to collect additional margin from the customer or to liquidate the customer's position if the amount of margin held by the banking institution fails to meet the requirements of paragraph (a). The proposed rule requires the banking institution to mark the customer's open retail forex positions and the value of the customer's margin to the market daily to ensure that a retail forex customer does not accumulate substantial losses not covered by margin.

Question II.9.4: How frequently do banking institutions currently mark retail forex customers' open retail forex positions and the value of the customers' margin to the market? Should the rule require marking customer positions and margin to the market daily, or would more frequent marks be more appropriate in light of the speed at which currency markets move? What is the most frequent mark to market requirement that is practical in light of the characteristics of the forex markets and the assets that retail forex customers may pledge as margin for retail forex transaction?

The retail forex regulations adopted by the OCC and FDIC both prohibit set-off, i.e., the bank forex dealer would be prohibited from applying a retail forex customer's losses against any asset or liability of the retail forex customer other than money or property given as margin. Banks generally have broad rights to set off mutual debts to cover customer obligations. It is not clear that limiting a bank's right of set-off in these particular transactions would provide appropriate incentives for retail forex customers.

Question II.9.5: Would limiting the right of set-off encourage a retail customer to take on more risk in forex transactions, because the customer's other assets would be protected against losses from the forex transactions? Does allowing a banking institution to exercise its right of set-off with regard to retail forex transactions strike the appropriate balance of incentives and protections for retail customers?

In order to effectuate the prohibition against a bank retail forex dealer exercising a right of set-off, the OCC and FDIC require that each customer's retail forex transaction margin be held in a separate account that holds only that customer's retail forex transaction margin. The Board is not proposing to require the use of a separate margin account, as it is not proposing to prohibit a banking institution from exercising a right of set-off.

Section 240.10—Required Reporting to Customers

This section requires a banking institution engaging in retail forex transactions to provide each retail forex customer confirmations and monthly statements, and describes the information to be included.

Question II.10.1: The Board requests comment on whether this section provides for statements that would be meaningful and useful to retail customers, or whether, in light of the

[31] 12 CFR 208.43 and 12 CFR 225.2(r).

[32] 12 CFR 225.2(r)(3).

[33] 12 CFR 211.12(c)(2).

[34] *See* National Futures Association, *Forex Transaction: A Regulatory Guide* 17 (Feb. 2011); New York Federal Reserve Bank, *Survey of North American Foreign Exchange Volume* tbl. 3e (Jan. 2011); Bank for International Settlements, *Report on Global Foreign Exchange Market Activity in 2010* at 15 tbl. B.6 (Dec. 2010).

distinctive characteristics of retail forex transactions, other information would be more appropriate.

Section 240.11—Unlawful Representations

This section prohibits a banking institution and its related persons from representing that the Federal government, the Board, or any other Federal agency has sponsored, recommended, or approved retail forex transactions or products in any way. This section also prohibits a banking institution from implying or representing that it will guarantee against or limit retail forex customer losses or not collect margin as required by section 240.9. This section does not prohibit a banking institution from sharing in a loss resulting from error or mishandling of an order, and guaranties entered into prior to the effectiveness of the prohibition would only be affected if an attempt is made to extend, modify, or renew them. This section also does not prohibit a banking institution from hedging or otherwise mitigating its own exposure to retail forex transactions or any other foreign exchange risk.

Section 240.12—Authorization To Trade

This section requires a banking institution to have specific authorization from a retail forex customer before effecting a retail forex transaction for that customer.

Section 240.13—Trading and Operational Standards

This section largely follows the trading standards of the CFTC's retail forex rule, which were developed to prevent some of the deceptive or unfair practices identified by the CFTC and the National Futures Association.

Under paragraph (a), a banking institution engaging in retail forex transactions is required to establish and enforce internal rules, procedures and controls to prevent front running, in which transactions in accounts of the banking institution or its related persons are executed before a similar customer order, and to establish settlement prices fairly and objectively.

Paragraph (b) prohibits a banking institution engaging in retail forex transactions from disclosing that it holds another person's order unless disclosure is necessary for execution or is made at the Board's request.

Paragraph (c) ensures that related persons of another retail forex counterparty do not open accounts with a banking institution without the knowledge and authorization of the account surveillance personnel of the other retail forex counterparty to which they are affiliated. Similarly, paragraph (d) ensures that related persons of a banking institution do not open accounts with other retail forex counterparties without the knowledge and authorization of the account surveillance personnel of the banking institution to which they are affiliated.

Paragraph (e) prohibits a banking institution engaging in retail forex transactions from (1) Entering a retail forex transaction to be executed at a price that is not at or near prices at which other retail forex customers have executed materially similar transactions with the banking institution during the same time period, (2) changing prices after confirmation, (3) providing a retail forex customer with a new bid price that is higher (or lower) than previously provided without providing a new ask price that is similarly higher (or lower) as well, and (4) establishing a new position for a retail forex customer (except to offset an existing position) if the banking institution holds one or more outstanding orders of other retail forex customers for the same currency pair at a comparable price.

Paragraphs (e)(3) and (e)(4) do not prevent a banking institution from changing the bid or ask prices of a retail forex transaction to respond to market events. The Board understands that market practice among CFTC-registrants is not to offer requotes, but to simply reject orders and advise customers they may submit a new order (which the dealer may or may not accept). Similarly, a banking institution may reject an order and advise customers they may submit a new order.

Question II.13.1: Does this requirement appropriately protect retail forex customers? If not, how should it be modified? Would it be simpler for the rule to simply prohibit requoting, because banking institutions may instead reject an order and accept new orders from their retail forex customers?

Paragraph (e)(5) requires a banking institution to use consistent market prices for customers executing retail forex transactions during the same time. It also prevents a banking institution from offering preferred execution to some of its retail forex customers but not others.

Section 240.14—Supervision

This section imposes on a banking institution and its agents, officers, and employees a duty to supervise subordinates with responsibility for retail forex transactions to ensure compliance with the Board's retail forex rule.

Section 240.15—Notice of Transfers

This section describes the requirements for transferring a retail forex account. Generally, a banking institution must provide retail forex customers 30 days' prior notice before transferring or assigning their account. Affected customers may then instruct the banking institution to transfer the account to an institution of their choosing or liquidate the account. There are three exceptions to the above notice requirement: A transfer in connection with the receivership or conservatorship under the Federal Deposit Insurance Act; a transfer pursuant to a retail forex customer's specific request; and a transfer otherwise allowed by applicable law. A banking institution that is the transferee of retail forex accounts must generally provide the transferred customers with the risk disclosure statement of section 240.6 and obtain each affected customer's written acknowledgement within 60 days.

Section 240.16—Customer Dispute Resolution

This section prohibits a banking institution from entering into any agreement or understanding with a retail forex customer in which the customer agrees, prior to the time a claim or grievance arises, to submit the claim or grievance to any settlement procedure.

This provision differs from the applicable CFTC dispute settlement procedures, which permit mandatory pre-dispute settlement agreements under certain conditions.[35] The substance of the CFTC dispute settlement regulation, however, dates back to August 10, 2001. Since that time, Congress enacted seven provisions in the Dodd-Frank Act that prohibit the use of pre-dispute arbitration provisions.[36] Consonant with this

[35] 17 CFT 166.5. The CFTC's regulation permits predispute dispute settlement agreements with a customer with certain restrictions such as that signing the agreement must not be made a condition for the customer to utilize the services offered by the CFTC registrant.

[36] *See* Dodd-Frank Act section 748 (amending CEA section 23(n)(2) to provide: ''No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.''); section 921(a) (adding similar provisions to section 15o to the Securities Exchange Act of 1934 and section 205(f) to the Investment Advisers Act of 1940); section 922(c) (adding a similar provision to 18 U.S.C. 1514A, which provides employee protections, including a right to a jury trial to enforce such protections, to employees of publicly registered companies and nationally recognized statistical rating organizations); section 1028 (requiring the Consumer Financial Protection Bureau (CFPB) to conduct a study and report to Congress on the use of predispute arbitration agreements ''between

Continued

demonstrated Congressional concern with such agreements, the Board is proposing, pursuant to its authority to adopt ''such other standards or requirements as [it] shall determine to be necessary,'' to prohibit a banking institution from entering into a pre-dispute settlement agreement with a retail forex customer. The OCC's final retail forex regulation follows the CFTC's approach, while the FDIC's final regulation prohibits pre-dispute settlement agreements similar to the approach being proposed by the Board.

Question III.16.1: Should the Board permit pre-dispute arbitration provisions, as long as the banking institution does not require a customer to agree to pre-dispute arbitration as a condition of opening a retail forex account?

Interagency Statement on Retail Sales of Nondeposit Investment Products

For banking institutions, the requirements in this proposed rule would overlap with applicable expectations contained in the Interagency Statement on Retail Sales of Nondeposit Investment Products (NDIP Policy Statement).[37] The NDIP Policy Statement sets out guidance regarding the Board's expectations when a banking institution engages in the sale of nondeposit investment products to retail customers. The NDIP Policy Statement addresses issues such as disclosure, suitability, sales practices, compensation, and compliance. The Board views retail forex transactions as nondeposit investment products, but the terms ''retail forex customer'' in this proposed rule and ''retail customer'' in the NDIP Policy Statement are not necessarily co-extensive. After the effective date of the final version of this proposed rule, the Board will expect banking institutions engaging in or offering retail forex transactions to also comply with the NDIP Policy Statement to the extent such compliance does not conflict with the requirements of the Board's final retail forex rule.

Question II.17: Does the proposed regulation create issues concerning application of the NDIP Policy Statement to retail forex transactions that the Board should address?

III. Request for Comments

The Board requests comment on all aspects of the proposed rule, including the questions posed in the preamble. In addition, the Board requests comments on the following questions:

- *Question III.1:* Does the proposed rule appropriately protect retail forex customers of banking institutions?
- *Question III.2:* Are the proposed rule's variations from the CFTC retail forex rule appropriately tailored to the differences between banking institutions and CFTC registrants and the regulatory regimes applicable to each?

To assist in the review of comments, the Board requests that commenters identify their comments by question number.

IV. Regulatory Analysis

A. Regulatory Flexibility Act

In accordance with section 3(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), the Board is publishing an initial regulatory flexibility analysis for the proposed rule. The RFA generally requires an agency to provide an initial regulatory flexibility analysis with the proposed rule or to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. The Board welcomes comment on all aspects of the initial regulatory flexibility analysis. A final regulatory flexibility analysis will be conducted after consideration of the comments received during the comment period.

1. *Statement of objectives of the proposal.* Section 2(c)(2)(E) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(E)) will prohibit a U.S. financial institution from conducting retail foreign exchange transactions unless done pursuant a rule or regulation of a Federal regulatory agency allowing such transactions. The Board is proposing a new regulation to allow banking institutions under its supervision to engage in retail foreign exchange transactions.

2. *Small entities affected by the proposal.* Under regulations issued by the Small Business Administration, a banking institution is considered a ''small entity'' if it has assets of $175 million or less.[38] As of December 21, 2010, there were approximately 398 small state member banks, 20 small Edge Act and agreement corporations, 62 small uninsured branches of foreign banks, 3,988 small bank holding companies and 267 small financial holding companies. The Board is not aware of any small institutions engaged in retail forex transactions.

3. *Compliance requirements.* A description of the projected recordkeeping and other compliance requirements can be found below in section B, ''Paperwork Reduction Act,'' under the following headings: Reporting Requirements, Disclosure Requirements, and Policies and Procedures; Recordkeeping. The Board believes that there are no other compliance requirements for this proposed rule.

4. *Other Federal rules.* The Board believes that no Federal rules duplicate, overlap, or conflict with the proposed rule. As noted in the supplementary information above, retail forex transactions would also be subject to the Interagency Statement on Retail Sales of Nondeposit Investment Products, but this rule would govern to the extent of a conflict.

5. *Significant alternatives to the proposed rule.* As discussed above, the Board has requested comment on required disclosures, margin, and reporting requirements for all banking institutions engaging in retail foreign exchange transactions and has solicited comment on any approaches that would reduce the burden on all counterparties, including small entities. The Board welcomes comment on any significant alternatives that would minimize the impact of the proposal on small entities.

B. Paperwork Reduction Act

Request for Comment on Proposed Information Collection

In accordance with section 3512 of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), the Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The information collection requirements are found in §§ 240.4–240.7, 240.9–240.10, 240.13, 240.15–24016.

Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

(b) The accuracy of the estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

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covered persons and consumers in connection with the offering or providing of consumer financial products or services'' and giving the CFPB authority to adopt regulations prohibiting such agreements; section 1057(d) (prohibiting predispute arbitration agreements that affect the employee protection rights of a person that is employed by an entity subject to CFPB regulation; and section 1414 (amending section 129C of the Truth in Lending Act to prohibit predispute arbitration agreements with respect to residential mortgage loans and home equity loans).

[37] *See* SR Letter 94–11 (Feb. 17, 1994); *see also* SR Letter 95–46 (Sept. 14, 1995).

[38] U.S. Small Business Administration, Table of Small Business Size Matched to North American Industry Classification System Codes, 13 CFR 121.201.

(d) Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Comments on the collection of information should be sent to Cynthia Ayouch, Acting Federal Reserve Clearance Officer, Division of Research and Statistics, Mail Stop 95–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100–New), Washington, DC 20503. You may also submit comments electronically, identified by Docket number, by any of the following methods:

• *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments on the *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 docket number in the subject line of the message. All comments will become a matter of public record.

Proposed Information Collection

Title of Information Collection: Reporting, recordkeeping, and disclosure requirements associated with Regulation NN.

Frequency of Response: On occasion.

Affected Public: Businesses or other for-profit.

Respondents: Agreement corporations, Edge Act corporations, state member banks, uninsured branches of foreign banks, financial holding companies and bank holding companies (collectively, ''banking institutions'').

Reporting Requirements

The reporting requirements in § 240.4 would require that, prior to initiating a retail forex business, a banking institution provide the Board with prior notice. The notice must certify that the banking institution has written policies and procedures, and risk measurement and management systems in controls in place to ensure that retail forex transactions are conducted in a safe and sound manner. The banking institution must also provide other information required by the Board, such as documentation of customer due diligence, new product approvals, and haircuts applied to noncash margins. A banking institution already engaging in a retail forex business may continue to do so, provided it requests an extension of time.

Disclosure Requirements

Section 240.5, regarding the application and closing out of offsetting long and short positions, would require a banking institution to promptly provide the customer with a statement reflecting the financial result of the transactions and the name of the introducing broker to the account. The customer would provide specific written instructions on how the offsetting transaction should be applied.

Section 240.6 would require that a banking institution furnish a retail forex customer with a written disclosure before opening an account that will engage in retail forex transactions for a retail forex customer and receive an acknowledgment from the customer that it was received and understood. It also requires the disclosure by a banking institution of its fees and other charges and its profitable accounts ratio.

Section 240.10 would require a banking institution to issue monthly statements to each retail forex customer and to send confirmation statements following transactions.

Section 240.13(b) would allow disclosure by a banking institution that an order of another person is being held by them only when necessary to the effective execution of the order or when the disclosure is requested by the Board. Section 240.13(c) would prohibit a banking institution engaging in retail forex transactions from knowingly handling the account of any related person of another retail forex counterparty unless it receives proper written authorization, promptly prepares a written record of the order, and transmits to the counterparty copies of all statements and written records. Section 240.13(d) would prohibit a related person of a banking institution engaging in forex transactions from having an account with another retail forex counterparty unless it receives proper written authorization and copies of all statements and written records for such accounts are transmitted to the counterparty.

Section 240.15 would require a banking institution to provide a retail forex customer with 30 days' prior notice of any assignment of any position or transfer of any account of the retail forex customer. It would also require a banking institution to which retail forex accounts or positions are assigned or transferred to provide the affected customers with risk disclosure statements and forms of acknowledgment and receive the signed acknowledgments within 60 days.

The customer dispute resolution provisions in § 240.16 would require certain endorsements, acknowledgments, and signature language. It also would require that within 10 days after receipt of notice from the retail forex customer that they intend to submit a claim to arbitration, the banking institution provide them with a list of persons qualified in the dispute resolution and that the customer must notify the banking institution of the person selected within 45 days of receipt of such list.

Policies and Procedures; Recordkeeping

Section 240.7 would require that a banking institution engaging in retail forex transactions keep full, complete, and systematic records and establish and implement internal rules, procedures, and controls. Section 240.7 also would require that a banking institution keep account, financial ledger, transaction and daily records, as well as memorandum orders, post-execution allocation of bunched orders, records regarding its ratio of profitable accounts, possible violations of law, records for noncash margin, and monthly statements and confirmations. Section 240.9 would require policies and procedures for haircuts for noncash margin collected under the rule's margin requirements, and annual evaluations and modifications of the haircuts.

Estimated PRA Burden

Estimated Number of Respondents: 5 banking institutions; 2 service providers.

Total Reporting Burden: 80 hours.

Total Disclosure Burden: 5,510 hours.

Total Recordkeeping Burden: 1,280 hours.

Total Annual Burden: 6,870 hours.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the Board to use plain language in all proposed and final rules published after January 1, 2000. The Board invites comment on how to make this proposed rule easier to understand. For example, the Board requests comment on such questions as:

• Have we organized the material to suit your needs? If not, how could the material be better organized?

• Have we clearly stated the requirements of the rule? If not, how could the rule be more clearly stated?

• Does the rule contain technical language or jargon that is not clear? If

so, which language requires clarification?

• Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?

• What else could we do to make the regulation easier to understand?

List of Subjects in 12 CFR Part 240

Banks, Banking, Consumer protection, Foreign currencies, Foreign exchange, Holding companies, Investments, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Board proposes to amend 12 CFR Chapter II as follows:

1. Add new part 240 to read as follows:

PART 240—RETAIL FOREIGN EXCHANGE TRANSACTIONS (REGULATION NN)

Sec.

240.1 Authority, purpose, and scope.
240.2 Definitions.
240.3 Prohibited transactions.
240.4 Notification.
240.5 Application and closing out of offsetting long and short positions.
240.6 Disclosure.
240.7 Recordkeeping.
240.8 Capital requirements.
240.9 Margin requirements.
240.10 Required reporting to customers.
240.11 Unlawful representations.
240.12 Authorization to trade.
240.13 Trading and operational standards.
240.14 Supervision.
240.15 Notice of transfers.
240.16 Customer dispute resolution.

Authority: 7 U.S.C. 2(c)(2)(E), 12 U.S.C. 248, 321–338, 1813(q), 1818, 1844(b), 3106a, 3108.

§ 240.1 Authority, purpose and scope.

(a) *Authority.* This part is issued by the Board of Governors of the Federal Reserve System (the Board) under the authority of section 2(c)(2)(E) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(E)), sections 9 and 11 of the Federal Reserve Act (12 U.S.C. 321–338 and 248), section 5(b) of the Bank Holding Company Act of 1956 (12 U.S.C. 1844(b)), sections 9 and 13a of the International Banking Act of 1978 (12 U.S.C. 3106a and 3108), and sections 3 and 8 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q) and 1818).

(b) *Purpose.* This part establishes rules applicable to retail foreign exchange transactions engaged in by banking institutions and applies on or after the effective date.

(c) *Scope.* Except as provided in paragraph (d) of this section, this part applies to banking institutions, as defined in section 240.2(b) of this part, and any branches or offices of those institutions wherever located. This part applies to subsidiaries of banking institutions organized under the laws of the United States or any U.S. state that are not subject to the jurisdiction of another federal regulatory agency authorized to prescribe rules or regulations under section 2(c)(2)(E) of the Commodity Exchange Act (7 U.S.C. (2)(c)(2)(E)).

(d) *International applicability.* Sections 240.3 and 240.5 through 240.16 do not apply to retail foreign exchange transactions between a foreign branch or office of a banking institution and a non-U.S. customer. With respect to those transactions, the foreign branch or office remains subject to any disclosure, recordkeeping, capital, margin, reporting, business conduct, documentation, and other requirements of applicable foreign law.

§ 240.2 Definitions.

For purposes of this part, the following terms have the same meaning as in the Commodity Exchange Act (7 U.S.C. 1 *et seq.*): ''affiliated person of a futures commission merchant''; ''associated person''; ''contract of sale''; ''commodity''; ''eligible contract participant''; ''futures commission merchant''; ''future delivery''; ''option''; ''security''; and ''security futures product.''

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Banking institution* means:

(1) A state member bank (as defined in 12 CFR 208.2);

(2) An uninsured state-licensed U.S. branch or agency of a foreign bank;

(3) A financial holding company (as defined in section 2 of the Bank Holding Company Act of 1956; 12 U.S.C. 1841);

(4) A bank holding company (as defined in section 2 of the Bank Holding Company Act of 1956; 12 U.S.C. 1841);

(5) A corporation operating under the fifth undesignated paragraph of section 25 of the Federal Reserve Act (12 U.S.C. 603), commonly known as ''an agreement corporation;'' and

(6) A corporation organized under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*), commonly known as an ''Edge Act corporation.''

(c) *Commodity Exchange Act* means the Commodity Exchange Act (7 U.S.C. 1 *et seq.*).

(d) *Forex* means foreign exchange.

(e) *Identified banking product* has the same meaning as in section 401(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)).

(f) *Institution-affiliated party* or IAP has the same meaning as in 12 U.S.C. 1813(u)(1), (2), or (3).

(g) *Introducing broker* means any person who solicits or accepts orders from a retail forex customer in connection with retail forex transactions.

(h) *Related person,* when used in reference to a retail forex counterparty, means:

(1) Any general partner, officer, director, or owner of ten percent or more of the capital stock of the banking institution;

(2) An associated person or employee of the retail forex counterparty, if the retail forex counterparty is not an insured depository institution;

(3) An IAP, if the retail forex counterparty is an insured depository institution; and

(4) Any relative or spouse of any of the foregoing persons, or any relative of such spouse, who shares the same home as any of the foregoing persons.

(i) *Retail foreign exchange dealer* means any person other than a retail forex customer that is, or that offers to be, the counterparty to a retail forex transaction, except for a person described in item (aa), (bb), (cc)(AA), (dd), or (ff) of section 2(c)(2)(B)(i)(II) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(B)(i)(II)).

(j) *Retail forex account* means the account of a retail forex customer, established with a banking institution, in which retail forex transactions with the banking institution as counterparty are undertaken, or the account of a retail forex customer that is established in order to enter into such transactions.

(k) *Retail forex account agreement* means the contractual agreement between a banking institution and a retail forex customer that contains the terms governing the customer's retail forex account with the banking institution.

(l) *Retail forex business* means engaging in one or more retail forex transactions with the intent to derive income from those transactions, either directly or indirectly.

(m) *Retail forex counterparty* includes, as appropriate:

(1) A banking institution;

(2) A retail foreign exchange dealer;

(3) A futures commission merchant;

(4) An affiliated person of a futures commission merchant; and

(5) A broker or dealer registered under section 15(b) (except paragraph (11) thereof) or 15C of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b), 78o–5) or a U.S. financial institution

other than a banking institution, provided the counterparty is subject to a rule or regulation of a Federal regulatory agency covering retail forex transactions.

(n) *Retail forex customer* means a customer that is not an eligible contract participant, acting on his, her, or its own behalf and engaging in retail forex transactions.

(o) *Retail forex proprietary account* means a retail forex account carried on the books of a banking institution for one of the following persons; a retail forex account of which 10 percent or more is owned by one of the following persons; or a retail forex account of which an aggregate of 10 percent or more of which is owned by more than one of the following persons:

(1) The banking institution;

(2) An officer, director or owner of ten percent or more of the capital stock of the banking institution; or

(3) An employee of the banking institution, whose duties include:

(i) The management of the banking institution's business;

(ii) The handling of the banking institution's retail forex transactions;

(iii) The keeping of records, including without limitation the software used to make or maintain those records, pertaining to the banking institution's retail forex transactions; or

(iv) The signing or co-signing of checks or drafts on behalf of the banking institution;

(4) A spouse or minor dependent living in the same household as of any of the foregoing persons; or

(5) An affiliate of the banking institution;

(p) *Retail forex transaction* means an agreement, contract, or transaction in foreign currency, other than an identified banking product or a part of an identified banking product, that is offered or entered into by a banking institution with a person that is not an eligible contract participant and that is:

(1) A contract of sale of a commodity for future delivery or an option on such a contract; or

(2) An option, other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)); or

(3) Offered or entered into on a leveraged or margined basis, or financed by a banking institution, its affiliate, or any person acting in concert with the banking institution or its affiliate on a similar basis, other than:

(i) A security that is not a security futures product as defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)); or

(ii) A contract of sale that—

(A) Results in actual delivery within two days; or

(B) Creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business; or

(iii) An agreement, contract, or transaction that the Board determines is not functionally or economically similar to an agreement, contract, or transaction described in paragraph (p)(1) or (p)(2) of this section.

§ 240.3 Prohibited transactions.

(a) *Fraudulent conduct prohibited.* No banking institution or its related persons may, directly or indirectly, in or in connection with any retail forex transaction:

(1) Defraud or attempt to defraud any person;

(2) Knowingly make or cause to be made to any person any false report or statement or cause to be entered for any person any false record; or

(3) Knowingly deceive or attempt to deceive any person by any means whatsoever.

(b) *Acting as counterparty and exercising discretion prohibited.* A banking institution that has authority to cause retail forex transactions to be effected for a retail forex customer without the retail forex customer's specific authorization may not (and an affiliate of such an institution may not) act as the counterparty for any retail forex transaction with that retail forex customer.

§ 240.4 Notification.

(a) *Notification required.* Before commencing a retail forex business, a banking institution shall provide the Board with prior written notice in compliance with this section. The notice will become effective 60 days after a complete notice is received by the Board, provided the Board does not request additional information or object in writing. In the event the Board requests additional information, the notice will become effective 60 days after all information requested by the Board is received by the Board unless the Board objects in writing.

(b) *Notification requirements.* A banking institution shall provide the following in its written notification:

(1) Information concerning customer due diligence, including without limitation credit evaluations, customer appropriateness, and ''know your customer'' documentation;

(2) The haircuts to be applied to noncash margin as provided in 240.9(b)(2);

(3) Information concerning new product approvals;

(4) Information on addressing conflicts of interest; and

(5) A resolution by the banking institution's Board of Directors that the banking institution has established and implemented written policies, procedures, and risk measurement and management systems and controls for the purpose of ensuring that it conducts retail forex transactions in a safe and sound manner and in compliance with this part.

(c) *Treatment of existing retail forex businesses.* A banking institution that is engaged in a retail forex business on the effective date of this part may continue to do so, until and unless the Board objects in writing, so long as the institution submits the information required to be submitted under paragraphs (b)(1) through (5) of this section within 30 days of the effective date of this part, subject to an extension of time by the Board, and such additional information as requested by the Board thereafter.

(d) *Compliance with the Commodity Exchange Act.* A banking institution that is engaged in a retail forex business on the effective date of this part and complies with paragraph (c) of this section shall be deemed to be acting pursuant to a rule or regulation described in section 2(c)(2)(E)(ii)(I) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(E)(ii)(I)).

§ 240.5 Application and closing out of offsetting long and short positions.

(a) *Application of purchases and sales.* Any banking institution that—

(1) Engages in a retail forex transaction involving the purchase of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such purchase has an open retail forex transaction for the sale of the same currency;

(2) Engages in a retail forex transaction involving the sale of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such sale has an open retail forex transaction for the purchase of the same currency;

(3) Purchases a put or call option involving foreign currency for the account of any retail forex customer when the account of such retail forex customer at the time of such purchase has a short put or call option position with the same underlying currency, strike price, and expiration date as that purchased; or

(4) Sells a put or call option involving foreign currency for the account of any retail forex customer when the account of such retail forex customer at the time of such sale has a long put or call option position with the same underlying currency, strike price, and expiration date as that sold shall:

(i) Immediately apply such purchase or sale against such previously held opposite transaction with the same customer; and

(ii) Promptly furnish such retail forex customer with a statement showing the financial result of the transactions involved and the name of any introducing broker to the account.

(b) *Close-out against oldest open position.* In all instances in which the short or long position in a customer's retail forex account immediately prior to an offsetting purchase or sale is greater than the quantity purchased or sold, the banking institution shall apply such offsetting purchase or sale to the oldest portion of the previously held short or long position.

(c) *Transactions to be applied as directed by customer.* Notwithstanding paragraphs (a) and (b) of this section, the offsetting transaction shall be applied as directed by a retail forex customer's specific instructions. These instructions may not be made by the banking institution or a related person.

§ 240.6 Disclosure.

(a) *Risk disclosure statement required.* No banking institution may open or maintain an account that will engage in retail forex transactions for a retail forex customer unless the banking institution has furnished the retail forex customer with a separate written disclosure statement containing only the language set forth in paragraph (d) of this section and the disclosures required by paragraphs (e), (f), and (g) of this section.

(b) *Acknowledgement of risk disclosure statement required.* The banking institution must receive from the retail forex customer a written acknowledgement signed and dated by the customer that the customer received and understood the written disclosure statement required by paragraph (a) of this section.

(c) *Placement of risk disclosure statement.* The disclosure statement may be attached to other documents as the initial page(s) of such documents and as the only material on such page(s).

(d) *Content of risk disclosure statement.* The language set forth in the written disclosure statement required by paragraph (a) of this section shall be as follows:

Risk Disclosure Statement

Retail forex transactions generally involve the leveraged trading of contracts denominated in foreign currency with a banking institution as your counterparty. Because of the leverage and the other risks disclosed here, you can rapidly lose all of the funds or property you give the banking institution as margin for such trading and you may lose more than you pledge as margin.

You should be aware of and carefully consider the following points before determining whether such trading is appropriate for you.

(1) Trading foreign currencies is a not on a regulated market or exchange—your banking institution is your trading counterparty and has conflicting interests. The retail forex transaction you are entering into is not conducted on an interbank market, nor is it conducted on a futures exchange subject to regulation by the Commodity Futures Trading Commission. The foreign currency trades you transact are trades with your banking institution as the counterparty. When you sell, the banking institution is the buyer. When you buy, the banking institution is the seller. As a result, when you lose money trading, your banking institution is making money on such trades, in addition to any fees, commissions, or spreads the banking institution may charge.

(2) Any electronic trading platform that you may use for retail foreign currency transactions with your banking institution is not a regulated exchange. It is an electronic connection for accessing your banking institution. The terms of availability of such a platform are governed only by your contract with your banking institution. Any trading platform that you may use to enter into off-exchange foreign currency transactions is only connected to your banking institution. You are accessing that trading platform only to transact with your banking institution. You are not trading with any other entities or customers of the banking institution by accessing such platform. The availability and operation of any such platform, including the consequences of the unavailability of the trading platform for any reason, is governed only by the terms of your account agreement with the banking institution.

(3) You may be able to offset or liquidate any trading positions only through your banking institution because the transactions are not made on an exchange, and your banking institution may set its own prices. Your ability to close your transactions or offset positions is limited to what your banking institution will offer to you, as there is no other market for these transactions. Your banking institution may offer any prices it wishes. Your banking institution may establish its prices by offering spreads from third party prices, but it is under no obligation to do so or to continue to do so. Your banking institution may offer different prices to different customers at any point in time on its own terms. The terms of your account agreement alone govern the obligations your banking institution has to you to offer prices and offer offset or liquidating transactions in your account and make any payments to you. The prices offered by your banking institution may or may not reflect prices available elsewhere at any exchange, interbank, or other market for foreign currency.

(4) Paid solicitors may have undisclosed conflicts. The banking institution may compensate introducing brokers for introducing your account in ways that are not disclosed to you. Such paid solicitors are not required to have, and may not have, any special expertise in trading, and may have conflicts of interest based on the method by which they are compensated. You should thoroughly investigate the manner in which all such solicitors are compensated and be very cautious in granting any person or entity authority to trade on your behalf. You should always consider obtaining dated written confirmation of any information you are relying on from your banking institution in making any trading or account decisions.

(5) Retail forex transactions are not insured by the Federal Deposit Insurance Corporation.

(6) Retail forex transactions are not a deposit in, or guaranteed by, a banking institution.

(7) Retail forex transactions are subject to investment risks, including possible loss of all amounts invested.

Finally, you should thoroughly investigate any statements by any banking institution that minimize the importance of, or contradict, any of the terms of this risk disclosure. Such statements may indicate sales fraud.

This brief statement cannot, of course, disclose all the risks and other aspects of trading off-exchange foreign currency with a banking institution.

I hereby acknowledge that I have received and understood this risk disclosure statement.

_____

Date

_____

Signature of Customer

(e)(1) *Disclosure of profitable accounts ratio.* Immediately following the language set forth in paragraph (d) of this section, the statement required by paragraph (a) of this section shall include, for each of the most recent four calendar quarters during which the banking institution maintained retail forex customer accounts:

(i) The total number of retail forex customer accounts maintained by the banking institution over which the banking institution does not exercise investment discretion;

(ii) The percentage of such accounts that were profitable for retail forex customer accounts during the quarter; and

(iii) The percentage of such accounts that were not profitable for retail forex customer accounts during the quarter.

(2) *Statement of profitable trades.* (i) The banking institution's statement of profitable trades shall include the following legend: Past performance is not necessarily indicative of future results.

(ii) Each banking institution shall provide, upon request, to any retail forex customer or prospective retail forex customer the total number of retail forex accounts maintained by the banking institution for which the banking institution does not exercise investment discretion, the percentage of such accounts that were profitable, and the percentage of such accounts that were not profitable for each calendar quarter during the most recent five-year period during which the banking institution maintained such accounts.

(f) *Disclosure of fees and other charges.* Immediately following the language required by paragraph (e) of this section, the statement required by paragraph (a) of this section shall include:

(1) The amount of any fee, charge, or commission that the banking institution may impose on the retail forex customer in connection with a retail forex account or retail forex transaction;

(2) An explanation of how the banking institution will determine the amount of such fees, charges, or commissions; and

(3) The circumstances under which the banking institution may impose such fees, charges, or commissions.

(g) *Set off.* Immediately following the language required by paragraph (f) of this section, the statement required by paragraph (a) of this section shall include:

(1) A statement as to whether the banking institution will or will not retain the right to set off obligations of the retail forex customer arising from the customer's retail forex transactions, including margin calls and losses, against the customer's other assets held by the banking institution;

(2) If the banking institution states that it reserves its right to set off obligations of the retail forex customer arising from the customer's retail forex transactions against the customer's other assets, the banking institution must receive from the retail forex customer a written acknowledgement signed and dated by the customer that the customer received and understood the written disclosure required by paragraph (g)(1) of this section.

(h) *Future disclosure requirements.* If, with regard to a retail forex customer, the banking institution changes any fee, charge, or commission required to be disclosed under paragraph (f) of this section, then the banking institution shall mail or deliver to the retail forex customer a notice of the changes at least 15 days prior to the effective date of the change.

(i) *Form of disclosure requirements.* The disclosures required by this section shall be clear and conspicuous and designed to call attention to the nature and significance of the information provided.

(j) *Other disclosure requirements unaffected.* This section does not relieve a banking institution from any other disclosure obligation it may have under applicable law.

§ 240.7 Recordkeeping.

(a) *General rule.* A banking institution engaging in retail forex transactions shall keep full, complete and systematic records, together with all pertinent data and memoranda, of all transactions relating to its retail forex business, including:

(1) *Retail forex account records.* For each retail forex account:

(i) The name and address of the person for whom such retail forex account is carried or introduced and the principal occupation or business of the person.

(ii) The name of any other person guaranteeing the account or exercising trading control with respect to the account;

(iii) The establishment or termination of the account;

(iv) A means to identify the person who has solicited and is responsible for the account or assign account numbers in such a manner as to identify that person;

(v) The funds in the account, net of any commissions and fees;

(vi) The account's net profits and losses on open trades;

(vii) The funds in the account plus or minus the net profits and losses on open trades, adjusted for the net option value in the case of open options positions;

(viii) Financial ledger records that show separately for each retail forex customer all charges against and credits to such retail forex customer's account, including but not limited to retail forex customer funds deposited, withdrawn, or transferred, and charges or credits resulting from losses or gains on closed transactions; and

(ix) A list of all retail forex transactions executed for the account, with the details specified in paragraph (a)(2) of this section.

(2) Retail forex *transaction records.* For each retail forex transaction:

(i) The date and time the banking institution received the order;

(ii) The price at which the banking institution placed the order, or, in the case of an option, the premium that the retail forex customer paid;

(iii) The customer account identification information;

(iv) The currency pair;

(v) The size or quantity of the order;

(vi) Whether the order was a buy or sell order;

(vii) The type of order, if the order was not a market order;

(viii) The size and price at which the order is executed, or in the case of an option, the amount of the premium paid for each option purchased, or the amount credited for each option sold;

(ix) For options, whether the option is a put or call, expiration date, quantity, underlying contract for future delivery or underlying physical, strike price, and details of the purchase price of the option, including premium, mark-up, commission, and fees;

(x) For futures, the delivery date; and

(xi) If the order was made on a trading platform:

(A) The price quoted on the trading platform when the order was placed, or, in the case of an option, the premium quoted;

(B) The date and time the order was transmitted to the trading platform; and

(C) The date and time the order was executed.

(3) *Price changes on a trading platform.* If a trading platform is used, daily logs showing each price change on the platform, the time of the change to the nearest second, and the trading volume at that time and price.

(4) *Methods or algorithms.* Any method or algorithm used to determine the bid or asked price for any retail forex transaction or the prices at which customers orders are executed, including, but not limited to, any mark-ups, fees, commissions or other items which affect the profitability or risk of loss of a retail forex customer's transaction.

(5) *Daily records* which show for each business day complete details of:

(i) All retail forex transactions that are futures transactions executed on that day, including the date, price, quantity, market, currency pair, delivery date, and the person for whom such transaction was made;

(ii) All retail forex transactions that are option transactions executed on that day, including the date, whether the transaction involved a put or call, the expiration date, quantity, currency pair, delivery date, strike price, details of the purchase price of the option, including premium, mark-up, commission and fees, and the person for whom the transaction was made; and

(iii) All other retail forex transactions executed on that day for such account, including the date, price, quantity, currency and the person for whom such transaction was made.

(6) *Other records.* Written acknowledgements of receipt of the risk disclosure statement required by § 240.6(b), offset instructions pursuant to § 240.5(c), records required under paragraphs (b) through (f) of this section, trading cards, signature cards, street books, journals, ledgers, payment records, copies of statements of purchase, and all other records, data and memoranda that have been prepared in the course of the banking institution's retail forex business.

(b) *Ratio of profitable accounts.* (1) With respect to its active retail forex customer accounts over which it did not exercise investment discretion and that are not retail forex proprietary accounts open for any period of time during the quarter, a banking institution shall prepare and maintain on a quarterly basis (calendar quarter):

(i) A calculation of the percentage of such accounts that were profitable;

(ii) A calculation of the percentage of such accounts that were not profitable; and

(iii) Data supporting the calculations described in paragraphs (b)(1)(i) and (b)(1)(ii) of this section.

(2) In calculating whether a retail forex account was profitable or not profitable during the quarter, the banking institution shall compute the realized and unrealized gains or losses on all retail forex transactions carried in the retail forex account at any time during the quarter, and subtract all fees, commissions, and any other charges posted to the retail forex account during the quarter, and add any interest income and other income or rebates credited to the retail forex account during the quarter. All deposits and withdrawals of funds made by the retail forex customer during the quarter must be excluded from the computation of whether the retail forex account was profitable or not profitable during the quarter. Computations that result in a zero or negative number shall be considered a retail forex account that was not profitable. Computations that result in a positive number shall be considered a retail forex account that was profitable.

(3) A retail forex account shall be considered ''active'' for purposes of paragraph (b)(1) of this section if and only if, for the relevant calendar quarter, a retail forex transaction was executed in that account or the retail forex account contained an open position resulting from a retail forex transaction.

(c) *Records related to possible violations of law.* A banking institution engaging in retail forex transactions shall make a record of all communications received by the banking institution or its related persons concerning facts giving rise to possible violations of law related to the banking institution's retail forex business. The record shall contain: the name of the complainant, if provided; the date of the communication; the relevant agreement, contract, or transaction; the substance of the communication; and the name of the person who received the communication and the final disposition of the matter.

(d) *Records for noncash margin.* A banking institution shall maintain a record of all noncash margin collected pursuant to § 240.9. The record shall show separately for each retail forex customer:

(1) A description of the securities or property received;

(2) The name and address of such retail forex customer;

(3) The dates when the securities or property were received;

(4) The identity of the depositories or other places where such securities or property are segregated or held, if applicable;

(5) The dates on which the banking institution placed or removed such securities or property into or from such depositories; and

(6) The dates of return of such securities or property to such retail forex customer, or other disposition thereof, together with the facts and circumstances of such other disposition.

(e) *Order tickets.*

(1) Except as provided in paragraph (e)(2) of this section, immediately upon the receipt of a retail forex transaction order, a banking institution shall prepare an order ticket for the order (whether unfulfilled, executed or canceled). The order ticket shall include:

(i) Account identification (account or customer name with which the retail forex transaction was effected);

(ii) Order number;

(iii) Type of order (market order, limit order, or subject to special instructions);

(iv) Date and time, to the nearest minute, the retail forex transaction order was received (as evidenced by timestamp or other timing device);

(v) Time, to the nearest minute, the retail forex transaction order was executed; and

(vi) Price at which the retail forex transaction was executed.

(2) *Post-execution allocation of bunched orders.* Specific identifiers for retail forex accounts included in bunched orders need not be recorded at time of order placement or upon report of execution as required under paragraph (e)(1) of this section if the following requirements are met:

(i) The banking institution placing and directing the allocation of an order eligible for post-execution allocation has been granted written investment discretion with regard to participating customer accounts and makes the following information available to customers upon request:

(A) The general nature of the post-execution allocation methodology the banking institution will use;

(B) Whether the banking institution has any interest in accounts which may be included with customer accounts in bunched orders eligible for post-execution allocation; and

(C) Summary or composite data sufficient for that customer to compare the customer's results with those of other comparable customers and, if applicable, any account in which the banking institution has an interest.

(ii) Post-execution allocations are made as soon as practicable after the entire transaction is executed;

(iii) Post-execution allocations are fair and equitable, with no account or group of accounts receiving consistently favorable or unfavorable treatment; and

(iv) The post-execution allocation methodology is sufficiently objective and specific to permit the Board to verify fairness of the allocations using that methodology.

(f) *Record of monthly statements and confirmations.* A banking institution shall retain a copy of each monthly statement and confirmation required by § 240.10.

(g) *Form of record and manner of maintenance.* The records required by this section must clearly and accurately reflect the information required and provide an adequate basis for the audit of the information. A banking institution must create and maintain

audio recordings of oral orders and oral offset instructions. Record maintenance may include the use of automated or electronic records provided that the records are easily retrievable, and readily available for inspection.

(h) *Length of maintenance.* A banking institution shall keep each record required by this section for at least five years from the date the record is created.

§ 240.8 Capital requirements.

(a) *Capital required for a state member bank.* A banking institution defined in section 240.2(b)(1) offering or entering into retail forex transactions must be well-capitalized as defined in section 208.43 of Regulation H (12 CFR 208.243).

(b) *Capital required for an uninsured state-licensed branch of a foreign bank.* A banking institution defined in section 240.2(b)(2) offering or entering into retail forex transactions must be well-capitalized under the capital rules made applicable to it pursuant to section 225.2(r)(3) of Regulation Y (12 CFR 225.2(r)(3).

(c) *Capital required for financial holding companies and bank holding companies.* A banking institution defined in section 240.2(b)(3) or (4) offering or entering into retail forex transactions must be well-capitalized as defined in section 225.2(r) of Regulation Y (12 CFR Part 225.2(r)).

(d) *Capital required for an agreement corporation or Edge Act corporation.* A banking institution defined in section 240.2(b)(5) or (6) offering or entering into retail forex transactions must maintain capital in compliance with the capital adequacy guidelines that are made applicable to an Edge corporation engaged in banking pursuant to section 211.12(c)(2) of Regulation K (12 CFR 211.12(c)(2)).

§ 240.9 Margin requirements.

(a) *Margin required.* A banking institution engaging, or offering to engage, in retail forex transactions must collect from each retail forex customer an amount of margin not less than:

(1) Two percent of the notional value of the retail forex transaction for major currency pairs and 5 percent of the notional value of the retail forex transaction for all other currency pairs;

(2) For short options, 2 percent for major currency pairs and 5 percent for all other currency pairs of the notional value of the retail forex transaction, plus the premium received by the retail forex customer; or

(3) For long options, the full premium charged and received by the banking institution.

(b)(1) *Form of margin.* Margin collected under paragraph (a) of this section or pledged by a retail forex customer for retail forex transactions in excess of the requirements of paragraph (a) of this section must be in the form of cash or the following financial instruments:

(i) Obligations of the United States and obligations fully guaranteed as to principal and interest by the United States;

(ii) General obligations of any State or of any political subdivision thereof;

(iii) General obligations issued or guaranteed by any enterprise, as defined in 12 U.S.C. 4502(10);

(iv) Certificates of deposit issued by an insured depository institution, as defined in section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(2));

(v) Commercial paper;

(vi) Corporate notes or bonds;

(vii) General obligations of a sovereign nation;

(viii) Interests in money market mutual funds; and

(ix) Such other financial instruments as the Board deems appropriate.

(2) *Haircuts.* A banking institution shall establish written policies and procedures that include:

(i) Haircuts for noncash margin collected under this section; and

(ii) Annual evaluation, and, if appropriate, modification of the haircuts.

(c) *Major currencies.* (1) for the purposes of subsections (a)(1) and (a)(2), major currency means:

(i) United States Dollar (USD)
(ii) Canadian Dollar (CAD)
(iii) Euro (EUR)
(iv) United Kingdom Pound (GBP)
(v) Japanese Yen (JPY)
(vi) Swiss Franc (CHF)
(vii) New Zealand Dollar (NZD)
(viii) Australian Dollar (AUD)
(ix) Swedish Kronor (SEK)
(x) Danish Kroner (DKK)
(xi) Norwegian Krone (NOK), and
(xii) Any other currency as determined by the Board.

(d) *Margin calls; liquidation of position.* For each retail forex customer, at least once per day, a banking institution shall:

(1) Mark the value of the retail forex customer's open retail forex positions to market;

(2) Mark the value of the margin collected under this section from the retail forex customer to market;

(3) Determine whether, based on the marks in paragraphs (d)(1) and (d)(2) of this section, the banking institution has collected margin from the retail forex customer sufficient to satisfy the requirements of this section; and

(4) If, pursuant to paragraph (d)(3) of this section, the banking institution determines that it has not collected margin from the retail forex customer sufficient to satisfy the requirements of this section then, within a reasonable period of time, the banking institution shall either:

(i) Collect margin from the retail forex customer sufficient to satisfy the requirements of this section; or

(ii) Liquidate the retail forex customer's retail forex transactions.

§ 240.10 Required reporting to customers.

(a) *Monthly statements.* Each banking institution must promptly furnish to each retail forex customer, as of the close of the last business day of each month or as of any regular monthly date selected, except for accounts in which there are neither open positions at the end of the statement period nor any changes to the account balance since the prior statement period, but in any event not less frequently than once every three months, a statement that clearly shows:

(1) For each retail forex customer:

(i) The open retail forex transactions with prices at which acquired;

(ii) The net unrealized profits or losses in all open retail forex transactions marked to the market;

(iii) Any money, securities or other property required by § 240.9(d); and

(iv) A detailed accounting of all financial charges and credits to the retail forex customer's retail forex accounts during the monthly reporting period, including: money, securities, or property received from or disbursed to such customer; realized profits and losses; and fees, charges, and commissions.

(2) For each retail forex customer engaging in retail forex transactions that are options:

(i) All such options purchased, sold, exercised, or expired during the monthly reporting period, identified by underlying retail forex transaction or underlying currency, strike price, transaction date, and expiration date;

(ii) The open option positions carried for such customer and arising as of the end of the monthly reporting period, identified by underlying retail forex transaction or underlying currency, strike price, transaction date, and expiration date;

(iii) All such option positions marked to the market and the amount each position is in the money, if any;

(iv) Any money, securities or other property required by § 240.9(c); and

(v) A detailed accounting of all financial charges and credits to the

retail forex customer's retail forex accounts during the monthly reporting period, including: money, securities, or property received from or disbursed to such customer; realized profits and losses; premiums and mark-ups; and fees, charges, and commissions.

(b) *Confirmation statement.* Each banking institution must, not later than the next business day after any retail forex transaction, send:

(1) To each retail forex customer, a written confirmation of each retail forex transaction caused to be executed by it for the customer, including offsetting transactions executed during the same business day and the rollover of an open retail forex transaction to the next business day;

(2) To each retail forex customer engaging in forex option transactions, a written confirmation of each forex option transaction, containing at least the following information:

(i) The retail forex customer's account identification number;

(ii) A separate listing of the actual amount of the premium, as well as each mark-up thereon, if applicable, and all other commissions, costs, fees and other charges incurred in connection with the forex option transaction;

(iii) The strike price;

(iv) The underlying retail forex transaction or underlying currency;

(v) The final exercise date of the forex option purchased or sold; and

(vi) The date the forex option transaction was executed.

(3) To each retail forex customer engaging in forex option transactions, upon the expiration or exercise of any option, a written confirmation statement thereof, which statement shall include the date of such occurrence, a description of the option involved, and, in the case of exercise, the details of the retail forex or physical currency position which resulted therefrom including, if applicable, the final trading date of the retail forex transaction underlying the option.

(c) Notwithstanding the provisions of paragraphs (b)(1) through (3) of this section, a retail forex transaction that is caused to be executed for a pooled investment vehicle that engages in retail forex transactions need be confirmed only to the operator of such pooled investment vehicle.

(d) *Controlled accounts.* With respect to any account controlled by any person other than the retail forex customer for whom such account is carried, each banking institution shall promptly furnish in writing to such other person the information required by paragraphs (a) and (b) of this section.

(e) *Introduced accounts.* Each statement provided pursuant to the provisions of this section must, if applicable, show that the account for which the banking institution was introduced by an introducing broker and the name of the introducing broker.

§ 240.11 Unlawful representations.

(a) *No implication or representation of limiting losses.* No banking institution engaged in retail foreign exchange transactions or its related persons may imply or represent that it will, with respect to any retail customer forex account, for or on behalf of any person:

(1) Guarantee such person or account against loss;

(2) Limit the loss of such person or account; or

(3) Not call for or attempt to collect margin as established for retail forex customers.

(b) *No implication of representation of engaging in prohibited acts.* No banking institution or its related persons may in any way imply or represent that it will engage in any of the acts or practices described in paragraph (a) of this section.

(c) *No Federal government endorsement.* No banking institution or its related persons may represent or imply in any manner whatsoever that any retail forex transaction or retail forex product has been sponsored, recommended, or approved by the Board, the Federal government, or any agency thereof.

(d) *Assuming or sharing of liability from bank error.* This section shall not be construed to prevent a banking institution from assuming or sharing in the losses resulting from the banking institution's error or mishandling of a retail forex transaction.

(e) *Certain guaranties unaffected.* This section shall not affect any guarantee entered into prior to the effective date of this part, but this section shall apply to any extension, modification or renewal thereof entered into after such date.

§ 240.12 Authorization to trade.

(a) *Specific authorization required.* No banking institution may directly or indirectly effect a retail forex transaction for the account of any retail forex customer unless, before the transaction occurs, the retail forex customer specifically authorized the banking institution to effect the retail forex transaction.

(b) A retail forex transaction is ''specifically authorized'' for purposes of this section if the retail forex customer specifies:

(1) The precise retail forex transaction to be effected;

(2) The exact amount of the foreign currency to be purchased or sold; and

(3) In the case of an option, the identity of the foreign currency or contract that underlies the option.

§ 240.13 Trading and operational standards.

(a) *Internal rules, procedures, and controls required.* A banking institution engaging in retail forex transactions shall establish and implement internal rules, procedures, and controls designed, at a minimum, to:

(1) Ensure, to the extent reasonable, that each order received from a retail forex customer that is executable at or near the price that the banking institution has quoted to the customer is entered for execution before any order in any retail forex transaction for:

(i) A proprietary account;

(ii) An account in which a related person has an interest, or any account for which such a related person may originate orders without the prior specific consent of the account owner if the related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account;

(iii) An account in which a related person has an interest, if the related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account; or

(iv) An account in which a related person may originate orders without the prior specific consent of the account owner, if the related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account;

(2) Prevent banking institution related persons from placing orders, directly or indirectly, with another person in a manner designed to circumvent the provisions of paragraph (a)(1) of this section; and

(3) Fairly and objectively establish settlement prices for retail forex transactions.

(b) *Disclosure of retail forex transactions.* No banking institution engaging in retail forex transactions may disclose that an order of another person is being held by the banking institution, unless the disclosure is necessary to the effective execution of such order or the disclosure is made at the request of the Board.

(c) *Handling of retail forex accounts of related persons of retail forex counterparties.* No banking institution engaging in retail forex transactions shall knowingly handle the retail forex account of any related person of another

retail forex counterparty unless the banking institution:

(1) Receives written authorization from a person designated by such other retail forex counterparty with responsibility for the surveillance over such account pursuant to paragraph (a)(2) of this section;

(2) Prepares immediately upon receipt of an order for the account a written record of the order, including the account identification and order number, and records thereon to the nearest minute, by time-stamp or other timing device, the date and time the order is received; and

(3) Transmits on a regular basis to the other retail forex counterparty copies of all statements for the account and of all written records prepared upon the receipt of orders for the account pursuant to paragraph (c)(2) of this section.

(d) *Related person of banking institution establishing account at another retail forex counterparty.* No related person of a banking institution working in the banking institution's retail forex business may have an account, directly or indirectly, with another retail forex counterparty unless the other retail forex counterparty:

(1) Receives written authorization to open and maintain the account from a person designated by the banking institution of which it is a related person with responsibility for the surveillance over the account pursuant to paragraph (a)(2) of this section; and

(2) Transmits on a regular basis to the banking institution copies of all statements for the account and of all written records prepared by the other retail forex counterparty upon receipt of orders for such account pursuant to paragraph (c)(2) of this section.

(e) *Prohibited trading practices.* No banking institution engaging in retail forex transactions may:

(1) Enter into a retail forex transaction, to be executed pursuant to a market or limit order at a price that is not at or near the price at which other retail forex customers, during that same time period, have executed retail forex transactions with the banking institution;

(2) Adjust or alter prices for a retail forex transaction after the transaction has been confirmed to the retail forex customer;

(3) Provide a retail forex customer a new bid price for a retail forex transaction that is higher than its previous bid without providing a new asked price that is also higher than its previous asked price by a similar amount;

(4) Provide a retail forex customer a new bid price for a retail forex transaction that is lower than its previous bid without providing a new asked price that is also lower than its previous asked price by a similar amount; or

(5) Establish a new position for a retail forex customer (except one that offsets an existing position for that retail forex customer) where the banking institution holds outstanding orders of other retail forex customers for the same currency pair at a comparable price.

§ 240.14 Supervision.

(a) *Supervision by the banking institution.* A banking institution engaging in retail forex transactions shall diligently supervise the handling by its officers, employees, and agents (or persons occupying a similar status or performing a similar function) of all retail forex accounts carried, operated, or advised by the banking institution and all activities of its officers, employees, and agents (or persons occupying a similar status or performing a similar function) relating to its retail forex business.

(b) *Supervision by officers, employees, or agents.* An officer, employee, or agent of a banking institution must diligently supervise his or her subordinates' handling of all retail forex accounts at the banking institution and all the subordinates' activities relating to the banking institution's retail forex business.

§ 240.15 Notice of transfers.

(a) *Prior notice generally required.* Except as provided in paragraph (b) of this section, a banking institution must provide a retail forex customer with 30 days' prior notice of any assignment of any position or transfer of any account of the retail forex customer. The notice must include a statement that the retail forex customer is not required to accept the proposed assignment or transfer and may direct the banking institution to liquidate the positions of the retail forex customer or transfer the account to a retail forex counterparty of the retail forex customer's selection.

(b) *Exceptions.* The requirements of paragraph (a) of this section shall not apply to transfers:

(1) Requested by the retail forex customer;

(2) Made by the Federal Deposit Insurance Corporation as receiver or conservator under the Federal Deposit Insurance Act; or

(3) Otherwise authorized by applicable law.

(c) *Obligations of transferee banking institution.* A banking institution to which retail forex accounts or positions are assigned or transferred under paragraph (a) of this section must provide to the affected retail forex customers the risk disclosure statements and forms of acknowledgment required by this part and receive the required signed acknowledgments within sixty days of such assignments or transfers. This requirement shall not apply if the banking institution has clear written evidence that the retail forex customer has received and acknowledged receipt of the required disclosure statements.

§ 240.16 Customer dispute resolution.

(a) No banking institution shall enter into any agreement or understanding with a retail forex customer in which the customer agrees, prior to the time a claim or grievance arises, to submit any claim or grievance regarding any retail forex transaction or disclosure to any settlement procedure.

(b) *Election of forum.*

(1) Within 10 business days after the receipt of notice from the retail forex customer that the customer intends to submit a claim to arbitration, the banking institution shall provide the customer with a list of persons qualified in dispute resolution.

(2) The customer must, within 45 days after receipt of such list, notify the national bank of the person selected. The customer's failure to provide such notice shall give the banking institution the right to select a person from the list.

(c) *Enforceability.* A dispute settlement procedure may require parties using the procedure to agree, under applicable state law, submission agreement, or otherwise, to be bound by an award rendered in the procedure if the agreement to submit the claim or grievance to the procedure was made after the claim or grievance arose. Any award so rendered by the procedure will be enforceable in accordance with applicable law.

(d) *Time limits for submission of claims.* The dispute settlement procedure used by the parties may not include any unreasonably short limitation period foreclosing submission of a customer's claims or grievances or counterclaims.

(e) *Counterclaims.* A procedure for the settlement of a retail forex customer's claims or grievances against a banking institution or employee thereof may permit the submission of a counterclaim in the procedure by a person against whom a claim or grievance is brought if the counterclaim:

(1) Arises out of the transaction or occurrence that is the subject of the retail forex customer's claim or grievance; and

(2) Does not require for adjudication the presence of essential witnesses, parties, or third persons over which the settlement process lacks jurisdiction.

By order of the Board of Governors of the Federal Reserve System, July 28, 2011.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2011–19535 Filed 8–2–11; 8:45 am]

BILLING CODE 6210–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–64766; File No. S7–25–11]

RIN 3235–AL10

Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants

Correction

In proposed rule document number 2011–16758, appearing on pages 42396–42455 in the issue of Monday, July 18, 2011, make the following corrections:

PART 240 § 240.15Fh–3 [Corrected]

1. On page 42455, in the third column, *§ 240.15Fh–3 (f)(2),* paragraph two ''(g)(1)'' should read ''(f)(1)''.

2. On the same page, in the same column, *§ 240.15Fh–3,* paragraph nine ''(h)'' should read ''(g)''.

3. On the same page, in the same column, third from the bottom of the page, ''(i)'' should read ''(h)''.

[FR Doc. C1–2011–16758 Filed 8–3–11; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 357

[Docket No. RM11–21–000]

Revision to Form No. 6

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) proposes to amend the instructions on page 700 of FERC Form No. 6 (Form 6) to ensure that pipelines report interstate-only barrel and barrel-mile data and not a combination of interstate and intrastate throughput. The Commission also proposes to direct pipelines that reported combined interstate and intrastate data on lines (1) through (12) of page 700 of their 2010 Form 6 to file a revised page 700 containing only interstate data for the years 2009 and 2010.

DATES: Comments are due October 3, 2011.

FOR FURTHER INFORMATION CONTACT:

Andrew Knudsen (Legal Information), Office of the General Counsel, 888 First Street, NE., Washington, DC 20426, (202) 502–6527, *Andrew.Knudsen@ferc.gov.*

Michael Lacy (Technical Information), Office of Energy Market Regulation, 888 First Street, NE., Washington, DC 20426, (202) 502–8843, *Michael.Lacy@ferc.gov.*

Brian Holmes (Technical Information), Office of Enforcement, 888 First Street, NE., Washington, DC 20426, (202) 502–6008, *Brian.Holmes@ferc.gov.*

SUPPLEMENTARY INFORMATION: July 29, 2011.

1. The Federal Energy Regulatory Commission (Commission) proposes to amend the instructions on page 700, Annual Cost of Service Based Analysis Schedule, of FERC Form No. 6, Annual Report of Oil Pipeline Companies, (Form 6) to ensure that pipelines report interstate-only barrel and barrel-mile data and not a combination of interstate and intrastate throughput. The Commission also directs pipelines that reported combined interstate and intrastate data in any field on lines (1) through (12) of page 700 of their 2010 Form 6 [1] to file within 90 days of the final rule's publication in the **Federal Register** a revised page 700 containing only interstate data for the years 2009 and 2010.

Background

2. Page 700 of Form 6 serves as a preliminary screening tool for pipeline rate filings with the Commission.[2] Specifically, page 700 enables shippers to evaluate proposed rate changes under the indexing methodology [3] and to determine whether a pipeline's cost of service or per barrel-mile costs are so substantially divergent from the revenues produced to warrant a challenge.[4] In Order No. 620, the Commission clarified that it intended page 700 to include only the interstate costs and interstate revenues, and not a combination of interstate and intrastate data.[5]

Discussion

3. The Commission proposes to modify the instructions on page 700 to specify that pipelines must report interstate throughput levels and exclude throughput associated with intrastate movements. The current instructions on page 700 for lines (11) and (12) may inadvertently have caused some pipelines to report barrel and barrel-mile throughput that combines interstate and intrastate data. The instruction for line (12) on page 700 directs pipelines to report the same barrel-mile figures as those reported on line 33a of page 600 of the Form 6. Similarly, the instruction for line (11) on page 700 directs pipelines to report the same barrel figures as those reported on line 33b of page 601 of the Form 6. Thus, the instructions on page 700 specify that the throughput data reported on page 700 is the same throughput data that is reported on page 600–601.[6] The instructions for page 600 direct pipelines to include ''all oils received'' by the pipeline,[7] which consequently may have led some filers to report combined interstate and intrastate barrel-miles on lines (11) and (12) of page 700.

4. It is an axiomatic rule of ratemaking that the same set of costs and volumes must be used to determine rates.[8] The Commission did not intend for the cost of service per-barrel/mile data provided by page 700 to include interstate-only costs and revenues alongside throughput data that combines interstate and intrastate totals. To address this reporting issue, the Commission now proposes to modify the instructions for line (11) [9] and line (12) [10] of page 700 to more precisely direct pipelines to report

[1] Pipelines filed their 2010 FERC Form 6 on April 18, 2011.

[2] All jurisdictional pipelines are required to file page 700, including pipelines exempt from filing the full Form 6. 18 CFR 357.2(a)(2) and (a)(3) (2011).

[3] *Cost of Service Requirements and Filing Requirements for Oil Pipelines,* Order No. 571, FERC Stats. & Regs. ¶ 31,006, at 31,168 (1995).

[4] *Revisions to and Electronic Filing of the FERC Form No. 6 and Related Uniform Systems of Accounts,* Order No. 620, FERC Stats. & Regs. ¶ 31,115, at 31,960, *on reh'g,* 94 FERC 61,130 (2001).

[5] Order No. 620, FERC Stats. & Regs. at 31,959, *on reh'g,* 94 FERC at 61,498.

[6] Pages 600–601 are entitled Statistics of Operations.

[7] Pipelines filing pages 600–601 as well as page 700 may transport both interstate and intrastate barrels.

[8] *Five-Year Review of Oil Pipeline Pricing Index,* 75 FR 80300, 80308 (Dec. 22, 2010), 133 FERC ¶ 61,228, at P 85 (2010), *order on reh'g,* 135 FERC ¶ 61,172 (2011).

[9] Instruction number 4 on page 700 of the Form 6.

[10] Instruction number 5 on page 700 of the Form 6.

only interstate barrels and interstate barrel-miles and not a combination of interstate and intrastate throughput.

5. The Commission further proposes to require pipelines that reported throughput levels on their 2010 Form 6, page 700 reflecting both interstate and intrastate data to file a revised page 700 with only interstate barrels and barrel-miles for 2009 and 2010. Moreover, the current instructions on page 700 require that pipelines report interstate-only data on lines (1) through (10) relating to various cost, revenue and other ratemaking elements. Any pipeline that reported combined interstate and intrastate data on lines (1)–(10) of page 700 must also file corrections so that page 700 only contains interstate data for 2009 and 2010. This action ensures the availability of complete interstate cost per barrel-mile data consistent with the Commission's regulation of interstate oil and petroleum product pipeline rates and the intent of page 700 to enable the Commission and shippers to analyze interstate pipeline costs. Moreover, this requirement is consistent with the existing instructions on page 700, which allow staff to require the submission of cost-of-service workpapers pursuant to the 154–B methodology at any time.[11]

Information Collection Statement

6. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.[12] Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of an agency rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number. The Paperwork Reduction Act (PRA)[13] requires each federal agency to seek and obtain OMB approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability.[14]

7. The Commission is submitting these reporting requirements to OMB for its review and approval under section 3507(d) of the PRA. Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques.

8. The Commission's estimate of the additional Public Reporting Burden and cost related to the proposed rule in Docket RM11–21–000 follow. The Commission recognizes that there will be a one-time increased burden involved in the initial implementation associated with: (a) Using only interstate figures for lines 1–12 of page 700, and (b) re-filing of revised data for lines (1) through (12) of page 700 for 2009 and 2010. We estimate an additional one-time burden of one-hour per filer for the combined implementation and the re-filing of the page 700 for the 2009 and 2010 data. For the recurring effort involved in filing interstate data on lines (1) through (12) of page 700 for 2011 and future years, we estimate that the change in burden is negligible (after the initial implementation).

RM11–21, FERC Form 6	Annual number of filers	Estimated additional one-time burden per filer (hr.)	Total estimated additional one-time burden (hr.)	Estimated additional one-time cost per filer ($)[15]
Implementation Burden (one-time); and Re-filing of Page 700, lines 1–12 for 2009–2010 (one-time)	166[16]	1	166	$68.45
Total	166		166	11,362.70

The additional one-time burden of 166 hours is being spread over the three years for the purposes of submittal to the Office of Management and Budget (OMB), giving an average additional annual burden of 55.33 hours.

Information Collection Costs: The Commission seeks comments on the costs and burden to comply with these requirements.

Total additional one-time cost = $11,362.70.

Title: FERC–6, Annual Report of Oil Pipeline Companies.

Action: Proposed Revisions to the FERC Form 6.

OMB Control No: 1902–0022.

Respondents: Public and non-public utilities.

Frequency of Responses: Initial implementation and one-time re-filing of selected data for 2009–2010.

Necessity of the Information: This action ensures the availability of complete interstate cost per barrel-mile data consistent with the Commission's regulation of interstate oil and petroleum product pipeline rates and the intent of page 700 to enable the Commission and shippers to analyze interstate pipeline costs.

Internal review: The Commission has reviewed the proposed changes and has determined that the changes are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information collection requirements.

9. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director, e-mail: *DataClearance@ferc.gov,* Phone: (202) 502–8663, fax: (202) 273–0873]. Comments on the requirements of this rule may also be sent to the Office of Information and Regulatory Affairs,

[11] FERC Form No. 6, Page 700 (''A respondent may be requested by the Commission or its staff to provide its workpapers which support the data reported on page 700.'').

[12] 5 CFR part 1320.

[13] 44 U.S.C. 3501–3520.

[14] OMB's regulations at 5 CFR 1320.3(c)(4)(i) require that ''Any recordkeeping, reporting, or disclosure requirement contained in a rule of general applicability is deemed to involve ten or more persons.''

[15] Based on an estimated average cost per employee for 2011 (including salary plus benefits) of $142,372, the estimated average hourly cost per employee is $68.45. The average work year is 2,080 hours.

[16] Although 166 pipelines file page 700, the number of pipelines that must file corrected information will likely be substantially less. Some pipelines only transport interstate shipments and thus would have reported only interstate data on page 700. Other pipelines may have reported only interstate data on lines (1)–(12) on page 700, and these pipelines would not need to file additional data.

Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments should be sent by e-mail to OMB at *oira_submission@omb.eop.gov.* Please reference OMB Control No. 1902–0022, FERC–6 and the docket number of this proposed rulemaking in your submission.

Environmental Analysis

10. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[17] The actions taken here fall within categorical exclusions in the Commission's regulations for information gathering, analysis, and dissemination.[18] Therefore, an environmental assessment is unnecessary and has not been prepared in this rulemaking.

Regulatory Flexibility Act Certification

11. The Regulatory Flexibility Act of 1980 (RFA) requires agencies to prepare certain statements, descriptions, and analyses of proposed rules that will have a significant economic impact on a substantial number of small business entities.[19] Agencies are not required to make such an analysis if a rule would not have such an effect.

12. As explained above, the change to page 700 will not increase the burden of preparing page 700. Further, the time required to implement changes and to file any necessary one-time revision of the page 700 data as specified in this order is minimal, Thus, the Commission concludes that the final rule would not have a significant economic impact on small entities.

[17] *Regulations Implementing the National Environmental Policy Act,* Order No. 486, 486 FR 1750 (Jan. 22, 1988), FERC Stats. & Regs. ¶ 30,783 (1987).

[18] 18 CFR 380.4(a)(5).

[19] 5 U.S.C. 601–12.

Comment Procedures

13. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due 60 days from publication in the **Federal Register**. Comments must refer to Docket No. RM11–21–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

14. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

15. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

16. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

Document Availability

17. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

18. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

19. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or e-mail at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov.*

List of Subjects in 18 CFR Part 357

Pipelines, Reporting and recordkeeping requirements, Uniform system of accounts.

By direction of the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

Note: Appendix A will not be published in the *Code of Federal Regulations*

Appendix A—Summary of Proposed Changes to FERC Form 6, Page 700

Instruction 4 is revised to read as follows:

Enter on line 11, columns b and c, the interstate throughput in barrels for the current and previous calendar years.

Instruction 5 is revised to read as follows:

Enter on line 12, columns b and c, the interstate throughput in barrel-miles for the current and previous calendar years.

Line 11 is revised to read as follows:

Total Interstate Throughput in Barrels

Line 12 is revised to read as follows:

Total Interstate Throughput in Barrel-Miles

Note: Appendix B will not be published in the *Code of Federal Regulations*

Appendix B: Revised Page 700 to Form 6

BILLING CODE 6717–01–P

Name of Respondent	This Report Is: ☐ (1) An Original ☐ (2) A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of _____

Annual Cost of Service Based Analysis Schedule

1.) Use footnotes when particulars are required or for any explanations.
2.) Enter on lines 1-9, columns (b) and (c), the value the respondent's Operating & Maintenance Expenses, Depreciation Expense, AFUDC Depreciation, Amortization of Deferred Earnings, Rate Base, Rate of Return, Return, Income Tax Allowance, and Total Cost of Service, respectively, for the end of the current and previous calendar years. The values shall be computed consistent with the Commission's Opinion No. 154-B et al. methodology. Any item(s) not applicable to the filing, the pipeline company shall report nothing in columns (b) and (c).
3.) Enter on line 10, columns (b) and (c), total interstate operating revenue, as reported on page 301, for the current and previous calendar years.
4.) Enter on line 11, columns b and c, the interstate throughput in barrels for the current and previous calendar years.
5.) Enter on line 12, columns b and c, the interstate throughput in barrel-miles for the current and previous calendar years.
6.) If the company makes major changes to its application of the Opinion No. 154-B et al. methodology, it must describe such changes in a footnote, and calculate the amounts in columns (b) and (c) of lines No. 1-12 using the changed application.
7.) A respondent may be requested by the Commission or its staff to provide its workpapers which support the data reported on page 700.

Line No.	Item (a)	Current Year Amount (in dollars) (b)	Previous Year Amount (in dollars) (c)
1	Operating and Maintenance Expenses		
2	Depreciation Expense		
3	AFUDC Depreciation		
4	Amortization of Deferred Earnings		
5	Rate Base		
6	Rate of Return % (10.25% -10.25)		
7	Return on Rate Base		
8	Income Tax Allowance		
9	Total Cost of Service		
10	Total Interstate Operating Revenues		
11	Total Interstate Throughput in Barrels		
12	Total Interstate Throughput in Barrel-Miles		

[FR Doc. 2011–19652 Filed 8–2–11; 8:45 am]
BILLING CODE 6717–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. FDA–2005–N–0404; formerly Docket No. 2005N–0279]

RIN 0910–ZA26

Food Labeling; Gluten-Free Labeling of Foods; Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Food and Drug Administration (FDA) is reopening the comment period for the proposed rule on the ''gluten-free'' labeling of foods, published in the **Federal Register** of January 23, 2007 (72 FR 2795). In that document, FDA proposed to define the term ''gluten-free,'' for voluntary use in the labeling of foods, to mean that the food does not contain an ingredient that is any species of wheat, rye, barley, or a crossbred hybrid of these grains (collectively referred to as ''prohibited grains''); an ingredient that is derived from a prohibited grain and that has not been processed to remove gluten (*e.g.,* wheat flour); an ingredient that is derived from a prohibited grain and that has been processed to remove gluten (*e.g.,* wheat starch), if the use of that ingredient results in the presence of 20 parts per million (ppm) or more gluten in the food; or 20 ppm or more gluten. FDA also announced in the proposed rule that we intended to conduct a safety assessment for gluten exposure and seek comments on the safety assessment and its potential use in defining the term ''gluten-free'' in the final rule. A report by FDA discussing a health hazard assessment we conducted, which included a safety assessment for gluten exposure in individuals with celiac disease, has been peer reviewed by an external group of scientific experts, and we revised the assessment, as appropriate, based upon expert comments. FDA is reopening the comment period for the proposed rule on the ''gluten-free'' labeling of foods to, in part, announce the availability of and solicit comments on the report entitled ''Health Hazard Assessment for Effects of Gluten Exposure in Individuals with Celiac Disease: Determination of Tolerable Daily Intake Levels and Levels of Concern for Gluten'' (''Gluten Report''), which discusses the Agency's gluten safety assessment. The Agency also seeks comments on whether and, if so, how, the safety assessment should affect FDA's proposed definition of ''gluten-free'' in the final rule, and on a number of related issues. Finally, FDA seeks comments on the Agency's tentative conclusions that the safety assessment-based approach may lead to a conservative, highly uncertain estimation of risk to individuals with celiac disease associated with very low levels of gluten exposure; and that the

final rule should adopt the proposed rule's approach to defining the term ''gluten-free,'' because that approach takes into account the availability of reliable analytical methods and also considers other practical factors related to the needs of individuals with celiac disease and their food consumption.

DATES: Submit electronic or written comments by October 3, 2011.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2005–N–0404 (formerly Docket No. 2005N–0279) by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Written Submissions

Submit written submissions in the following ways:

• *Fax:* 301–827–6870.

• *Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and docket number and Regulatory Information Number (RIN) for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Rhonda R. Kane, Center for Food Safety and Applied Nutrition (HFS–820), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 240–402–2371, FAX 301–436–2636; *e-mail: rhonda.kane@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. The Proposed Rule

In the **Federal Register** of January 23, 2007 (72 FR 2795), FDA proposed to define the term ''gluten-free'' for the voluntary use in the labeling of foods to mean that the food does not contain: (1) An ingredient that is any species of wheat, rye, barley, or a crossbred hybrid of these grains (collectively referred to as ''prohibited grains''); (2) an ingredient that is derived from a prohibited grain and that has not been processed to remove gluten (*e.g.,* wheat flour); (3) an ingredient that is derived from a prohibited grain and that has been processed to remove gluten (*e.g.,* wheat starch), if the use of that ingredient results in the presence of 20 ppm or more gluten in the food; or (4) 20 ppm or more gluten. FDA stated in the proposal that establishing a definition of the term ''gluten-free'' and uniform conditions for its use in the labeling of foods is necessary to ensure that individuals with celiac disease are not misled and are provided with truthful and accurate information with respect to foods so labeled and to respond to a directive of the Food Allergen Labeling and Consumer Protection Act of 2004 (FALCPA) (Title II of Pub. L. 108–282).

In response to FALCPA, FDA convened an internal, interdisciplinary group to review the available literature and evaluate the current state of knowledge about scientifically sound approaches to establishing labeling thresholds for gluten (as well as for the major food allergens), including the data needs and advantages and disadvantages of each approach, among other issues. The resulting FDA report, entitled ''Approaches to Establish Thresholds for Major Food Allergens and for Gluten in Food,'' revised March 2006 (''Thresholds Report'') (Ref. 1), described four approaches that the Agency might consider using to establish a gluten threshold level, if the Agency chose to do so (Ref. 1 at pp. 2 and 42–45). As stated in the preamble to the proposed rule, the Thresholds Report concluded that an analytical methods-based approach and a safety assessment-based approach were the two viable approaches that FDA could use to establish a gluten threshold level to define the food labeling term ''gluten-free'' (72 FR 2795 at 2803).

Based upon the analytical methods-based approach, FDA proposed in 2007 a gluten threshold level of < 20 ppm (*i.e.,* a food labeled ''gluten-free'' cannot contain 20 ppm or more gluten) as one of the criteria to define the term ''gluten-free.'' Under this approach, the gluten threshold would be determined by the sensitivity of the analytical method(s) used to verify compliance.

FDA stated in the proposed rule (72 FR 2795 at 2803) that the Agency had tentatively determined that enzyme-linked immunosorbent assay (ELISA)-based methods can be used reliably and consistently to detect gluten at the level of 20 ppm in a variety of food matrices. We further stated that FDA was tentatively considering using < 20 ppm as the threshold gluten level, for purposes of enforcing a regulatory definition of ''gluten-free,'' based on the results of a method validation trial published in the peer-reviewed scientific literature (Ref. 2). Since the publication of our proposed rule, FDA has become aware that this method, which is known as the ''R5–Mendez Method'' (alternatively, also referred to as the ''ELISA R5 Mendez Method'') (Refs. 3 and 4), has received a *Certificate of Performance Tested*^{SM} *Status* from the AOAC Research Institute (Certificate No. 12061) (Ref. 5). This method is recommended for determining the gluten content of foods by the Codex Alimentarius Commission in the 2008 revised ''Codex Standard for Foods for Special Dietary Use for Persons Intolerant to Gluten (Codex Stan 118–1979)'' (Ref. 4).

In the proposed rule (72 FR 2795 at 2803), we mentioned two other validated ELISA-based methods that also can be used to detect gluten (Ref. 6). Although these ELISA-based methods have not been certified by AOAC International, the results of their multi-laboratory validation, which were published in the peer-reviewed scientific literature, indicate that they can reliably and consistently detect gluten at 20 ppm in a variety of food matrices. Similar to the R5–Mendez Method, these two ELISA-based methods are designed to detect the prolamin called ''gliadin'' in wheat (which represents approximately half the total gluten proteins in wheat) and to cross-react with the prolamins in the other gluten-containing grains rye and barley. These methods were validated in Japan and are official methods of the Japanese Ministry of Health, Labor and Welfare (Ref. 6). Of the two ELISA-based methods validated in Japan, FDA is considering for use the one that is currently commercially available in the United States (''Morinaga method'') (Ref. 7).

If FDA includes in its final rule a gluten threshold level of < 20 ppm as one of the criteria for defining the term ''gluten-free,'' the Agency has tentatively concluded that it would use both the ELISA R5–Mendez Method and the Morinaga method that are discussed in this **Federal Register** document (Refs. 5 and 7) to assess compliance with such gluten threshold level for foods bearing ''gluten-free'' labeling claims. By requiring concurrence between two validated, peer-reviewed ELISAs that

employ different antibodies and different methods of sample preparation of foods for analysis, the probability of erroneous results (e.g., false positives and false negatives) is diminished, which increases the confidence level of any conclusions made based on the results (Ref. 8). FDA seeks comments on this tentative conclusion.

FDA's proposed codified language in the proposed rule (72 FR 2795 at 2817) pertaining to the addition of a new § 101.91(c) states: ''*Compliance.* When compliance with paragraph (b) of this section is based on an analysis of the food, FDA will use a method that can reliably detect the presence of 20 ppm gluten in a variety of food matrices, including both raw and cooked or baked products.'' FDA tentatively concludes that the specific analytical methods that we will use to assess compliance with the < 20 ppm gluten threshold level in foods labeled ''gluten free'' should be specified in codified language. Doing so would clarify for interested stakeholders what methodology FDA intends to use for enforcement purposes. FDA recognizes that for some food matrices (*e.g.,* fermented or hydrolyzed foods), there are no currently available validated methods that can be used to accurately determine if these foods contain < 20 ppm gluten. In such cases, FDA is considering whether to require manufacturers of such foods to have a scientifically valid method [1] that will reliably and consistently detect gluten at 20 ppm or less before including a ''gluten-free'' claim in the labeling of their foods. FDA is requesting comments on this proposed approach as well as on whether FDA also should require these manufacturers to maintain records on test methods, protocols, and results and to make these records available to FDA upon inspection.

II. Health Hazard/Safety Assessment for Gluten Exposure in Individuals with Celiac Disease

The second possible approach deemed in the Thresholds Report to be feasible for establishing a gluten threshold level is the safety assessment-based approach. Under the safety assessment-based approach, the labeling threshold is determined at least in part on the basis of a ''safe'' level or ''tolerable daily intake'' (TDI) of a substance as calculated using the No Observed Adverse Effect Levels (NOAELs) and the Lowest Observed Adverse Effect Levels (LOAELs) from available dose-response data in animals or humans and applying one or more appropriate ''uncertainty factors'' to account for gaps, limitations, and uncertainty in the data and for inter-individual difference (*i.e.,* variability among individuals within the target population) (Ref. 1 at pp. 42–43). In the proposed rule, we stated that FDA would conduct a safety assessment for gluten exposure consistent with the safety assessment-based approach described in the Thresholds Report (72 FR 2795 at 2803).

We completed a health hazard assessment of the adverse health effects of gluten exposure in individuals with celiac disease that included a safety assessment for gluten. We submitted a report on this health hazard assessment, the Gluten Report (Ref. 9), to a group of external scientific experts for peer review, and revised the document, as appropriate, considering the experts' comments. The report concerning the external peer review is available for public review, and can be accessed at the Agency's Web site *http://www.fda.gov/downloads/Food/ScienceResearch/ResearchAreas/RiskAssessmentSafetyAssessment/UCM264150.pdf.*

FDA is now reopening the comment period on the proposed rule, in part, for the purpose of announcing the availability of, and soliciting comments on, our Gluten Report. The Agency also invites comments on whether and, if so, how the safety assessment should affect FDA's proposed definition of the food labeling term ''gluten-free'' in the final rule, and on a number of related issues.

FDA's assessment of the adverse health effects of gluten exposure in individuals with celiac disease presented in the Gluten Report followed established hazard assessment components and approaches used within the Center for Food Safety and Applied Nutrition (CFSAN) to determine TDIs for chemical and natural toxin contaminants in foods. The assessment combined safety and risk assessment principles, and the determination of TDIs relied primarily on human dose-response data from prospectively-designed challenge studies in which NOAELs and/or LOAELS are available. In the Gluten Report, FDA examines and provides an overview of the nature and characteristics of the adverse effects associated with celiac disease found in susceptible individuals, and an overview of gluten proteins involved in inducing these effects.

The Gluten Report also describes the nature of the evaluation FDA performed on the available dose-response and adverse health effects data associated with celiac disease. As explained in the Gluten Report, the Agency conducted a review of relevant gluten challenge and other dose-response studies and assessed these studies for routes of exposure, type of challenge material, timing of adverse response, type of adverse response, age groups of subjects, and other relevant dose-response characteristics. Based on the timing of adverse responses to gluten exposure, studies were delineated and assessed in the following reaction timeframes: Acute (hours up to and including 14 days), subchronic (greater than 14 days up to and including 3 months), and chronic (greater than 3 months). The types of adverse responses from dose-response studies characterized and assessed were the following: Morphological and/or physiological adverse health effects (*e.g.,* adverse changes in the small intestinal mucosa, gastrointestinal absorption measures, or immune response) and clinical adverse health effects (*e.g.,* diarrhea, constipation, abdominal pain, or fatigue). Also, gluten dose-response data were divided based on age of the subjects participating in the studies with children, represented by individuals from 1 year up to and including 18 years of age, and adults, represented by individuals greater than 18 years of age. These different categorizations allowed for characterization and comparison of TDIs and other safety assessment determinations from a variety of studies based on adverse health response type (*i.e.,* morphological and/or physiological or clinical), duration of gluten exposure (*i.e.,* acute, subchronic, or chronic) and age (*i.e.,* children or adults) of sensitive subjects with celiac disease. We calculated the TDI levels for gluten in both children and adults with celiac disease to be 0.4 milligrams (mg) gluten/day for adverse morphological and/or physiological adverse health effects and 0.015 mg gluten/day for clinical adverse health effects (regardless of the duration of gluten exposure). Further details about this calculation are available in the safety assessment itself.

In cases where more than one appropriate study was available for a given assessment category (*e.g.,* acute gluten exposures leading to morphological health effects in children), this assessment identified a ''critical study'' of high quality in line

[1] A scientifically valid method for purposes of substantiating a ''gluten-free'' claim for foods matrices where formally validated methods (*e.g.,* that underwent a multi-laboratory performance evaluation) do not exist is one that is accurate, precise, and specific for its intended purpose and where the results of the method evaluation are published in the peer-reviewed scientific literature. In other words, a scientifically valid test is one that consistently and reliably does what it is intended to do.

with the safety assessment procedure from which to estimate TDIs for the respective category. Once the NOAELs and/or LOAELs of the critical studies were determined from these data, a single 10-fold uncertainty factor was applied to account for inter-individual variability. In cases in which only LOAELs were available, a second 10-fold uncertainty factor to extrapolate from LOAEL values to NOAEL values was applied, which resulted in a 100-fold (*i.e.,* 10×10) reduction in the estimated TDI gluten levels.

As described in the Gluten Report, FDA also used the U.S. Department of Agriculture Continuing Survey of Food Intake by Individuals (CSFII) for the combined survey years of 1994 to 1996 and 1998 (Ref. 10) to conduct an exposure assessment in which a number of estimates of gluten consumption from food products are determined and presented (Ref. 9). Due to the absence of sufficient study data on actual dietary intakes of individuals with celiac disease, FDA had to make certain assumptions about how foods labeled ''gluten-free'' might be used by these persons. For example, in our gluten exposure assessment, we assumed that Americans with celiac disease would substitute ''gluten-free'' versions of the same types and quantities of foods that represent major sources of gluten consumed by persons who do not have celiac disease. Also, we assumed that all of the ''gluten-free'' versions of these foods would contain a uniform trace amount of gluten, representing the different estimated gluten levels of concern (LOCs) for these foods corresponding to the different TDIs of gluten we identified.

Based upon CSFII data, at the 90th percentile level of intake of ''all celiac disease grain foods,'' the estimated gluten LOC values for individuals with celiac disease presented in the Gluten Report range from 0.01 ppm to 0.6 ppm, depending upon the corresponding age group and whether the type of adverse health effects are clinical or morphological and/or physiological in nature. The lowest gluten and most conservative LOC value associated with a TDI that we estimated, 0.01 ppm gluten, would: (1) Be protective of the vast majority of individuals with celiac disease ages 1 year and older, including those most sensitive to gluten and (2) not cause clinical, morphological, and/or physiological adverse health effects. FDA tentatively concludes that, based on the LOCs identified in the safety assessment-based approach, the Agency should not use that approach in defining ''gluten-free'' because the estimation of risk to individuals with celiac disease associated with very low levels of gluten exposure may be conservative and highly uncertain.

Specific details with regard to the methodologies used, data considered, and conclusions can be found in the Gluten Report. FDA is interested in receiving public comments on the safety assessment and, in particular, comments concerning: (1) The assessment approach used, (2) the assumptions made, (3) the data considered, and (4) the transparency and clarity of the Gluten Report.

III. Discussion

A. Gluten Threshold Level of < 20 ppm To Define, in Part, the Term ''Gluten-Free''

We proposed to use an analytical methods-based approach to adopt a gluten threshold level of < 20 ppm as one of the criteria for defining the term ''gluten-free.'' Were we to move forward with this analytical methods-based approach, FDA is considering using both the two ELISA-based methods discussed in this **Federal Register** document (Refs. 5 and 7) when analysis of a food would be necessary in order to determine regulatory compliance with FDA's definition of ''gluten-free'' for a food bearing such a labeling claim. For the reasons discussed in this section, FDA tentatively concludes that, in the final rule, the definition of ''gluten-free'' should follow the proposed rule's analytical methods-based approach, which takes into account the availability of reliable analytical methods and also considers other practical factors related to the needs of individuals with celiac disease and their food consumption.

In the Thresholds Report, as well as in the proposed rule, FDA noted that the Agency's decisions in setting a threshold for gluten would require consideration of factors, such as ''ease of compliance and enforcement, stakeholder concerns (*i.e.,* industry, consumers, and other interested parties), economics (e.g., cost/benefit analysis), trade issues, and legal authorities'' (Ref. 1 at p. 45 and 72 FR 2795 at 2800). First, in order to enforce a regulatory definition of ''gluten-free,'' it is essential that the Agency have analytical methods that have been validated to detect the level of gluten at the cutoff point that the Agency uses to establish a gluten threshold level as a criterion to define the term ''gluten free.'' At the current time, FDA is not aware of any analytical methods that have been validated to reliably and consistently detect gluten below 20 ppm.

We also note that the proposed analytical methods-based threshold level of < 20 ppm gluten would be consistent with international standards currently in place. In 2008, after the issuance of the proposed rule, the Codex Alimentarius Commission adopted a revised ''Codex Standard for Foods for Special Dietary Use for Persons Intolerant to Gluten (Codex Stan 118–1979)'' (Ref. 4). This Codex standard established a threshold of 20 mg gluten per kilogram (kg) product (which is equivalent to 20 ppm gluten) for foods labeled ''gluten-free.''[2] In 2009, the Commission of European Communities issued a regulation (Ref. 13), in part, requiring that foods labeled ''gluten-free'' not contain more than 20 ppm gluten. This regulation is binding and applicable in all Member States of the European Union, which currently represents 27 countries in Europe (Refs. 13 and 14).

The European Union level of 20 ppm is consistent with statements by some celiac disease researchers and some epidemiologic evidence suggesting that variable trace amounts and concentrations of gluten in foods can be tolerated by most individuals with celiac disease without causing adverse health effects (Refs. 15 through 20). These statements and studies were considered in the safety assessment, but because these do not provide dose-response data necessary for development of a hazard/safety assessment, they were not factored into that analysis. FDA seeks comments on this research, conducted in Europe, much of which was focused on identifying a maximum threshold value for trace amounts of gluten in ''gluten-free'' diets. In their research report, a group of Spanish researchers described the importance of identifying such a maximum tolerable level of gluten in ''gluten-free'' foods to people with celiac disease:

> Although alternative therapies are now being researched * * *, the only treatment available nowadays for those suffering from celiac disease is to adhere to a strict gluten-free diet for life. This includes a combination of consumption of naturally gluten-free foods, such as meat, fish, fruit, vegetables, legumes, eggs and dairy products with gluten-free substitutes of bread, cookies, pasta and other cereal-based foods. Gluten-

[2] The Foreign Agriculture Organization and World Health Organization jointly created the Codex Alimentarius Commission, in part, to develop food standards and guidelines as well as related codes of practice to protect the health of consumers and to facilitate international trade (Ref. 11). There are currently more than 185 countries, including the United States, that are eligible to participate in the decision-making process to develop Codex standards (Ref. 12).

free products intended for dietary use have two main roles. On the one hand, they are essential for achieving a balanced diet and on the other, they minimize the differences with the diet of noncoeliac patients. These two roles should not be underestimated, the former should provide the appropriate energy and nutrients required for a healthy diet and the latter improves socialization of celiac patients, preventing them from looking different, from feeling deprivation and consequently from committing transgression. This is particularly important for the newly diagnosed as they are often undernourished, especially in cases in which a late diagnosis has occurred. This is also crucial during adolescence, widely documented as the most difficult stage to manage a strict gluten-free diet. Considering the important role of gluten-free products in the diet of coeliac patients, the quality of these products should be carefully assessed and reviewed. (Ref. 19).

FDA considers the points made by Gilbert and her colleagues to be important considerations in defining the term ''gluten-free.'' To the extent it is possible to do so and protect public health, we believe that we should set a gluten threshold level for ''gluten free'' labeling that best assists most individuals with celiac disease in adhering life-long to a ''gluten-free'' diet without causing adverse health consequences. If the prevalence of persons with celiac disease not following a ''gluten-free'' diet increases because there are fewer foods labeled ''gluten-free'' to choose from (because the criteria for making ''gluten-free'' labeling claims are too stringent for most food manufacturers to meet) or such foods become more expensive (because any changes made by manufacturers to enable them to meet more stringent criteria to make foods labeled ''gluten-free'' may increase their production costs), then these individuals could be at a higher risk of developing serious health complications and other diseases associated with celiac disease. In other words, moving to a definition of ''gluten-free'' that adopts a criterion that is much lower than < 20 ppm gluten could have an adverse impact on the health of Americans with celiac disease.

A consequence of using the analytical methods-based approach is that the words ''gluten-free'' could be used on a product that is not, in fact, entirely free of gluten. There is precedent in FDA regulations on defined ''free'' nutrient content labeling claims to allow up to a specified measurable amount of the substance that is the subject of each of those claims to be present in the food. For example, per reference amount customarily consumed or per labeled serving, a food labeled ''fat free'' could contain < 0.5 gram (g) of fat (§ 101.62(b)(1)(i) (21 CFR 101.62(b)(1)(i))), a food labeled ''cholesterol free'' could contain < 2 mg cholesterol (§ 101.62(d)(1)(i)(A)), and a food labeled ''sodium free'' could contain < 5 mg sodium (21 CFR 101.61(b)(1)(i)). FDA seeks comments regarding whether, in light of FDA's safety assessment and the data underlying it, the possible presence of more than 0.01 ppm but < 20 ppm gluten in a food bearing a ''gluten-free'' labeling claim would be a material fact that must be disclosed on the label in order to prevent a ''gluten-free'' claim from being false or misleading under the statutory definitions of misbranding found at 21 U.S.C. 321(n) and 343(a).

FDA also seeks comments, data, and any other information related to the issue of whether a ''gluten-free'' claim on foods that contain a trace level of gluten greater than 0.01 ppm but < 20 ppm should be qualified in a way to ensure that the claim is truthful and not misleading. In the proposed rule (72 FR 2795 at 2803 and 2804), the Agency discussed and requested comments on whether the addition of qualifying language would be necessary in order to inform individuals with celiac disease that a food labeled ''gluten-free'' nonetheless could contain the amount of gluten permitted by whatever labeling threshold level FDA established in a final rule. For example, an asterisk could be placed immediately after the term ''gluten-free'' (*i.e.,* ''gluten-free*'') on a food label or in food labeling, with a clarifying statement located in close proximity to that claim in a print size no smaller than 1/16 of an inch (*e.g.,* ''does not contain 20 ppm or more gluten'' or ''does not contain 20 micrograms or more gluten per 100 grams food''). In light of the safety assessment, and because FDA previously received very few comments on this issue, we are soliciting public comments again on whether it would be necessary to accompany any ''gluten-free'' labeling claim with the addition of qualifying language. Also, we request comments on the wording for any qualifying language and on its proximity to a ''gluten-free'' claim appearing on a food label or in food labeling.

B. Gluten Threshold Lower Than < 20 ppm To Define, in Part, the Term ''Gluten-Free''

FDA is considering whether and how the results of the safety assessment should alter the Agency's proposed definition of ''gluten-free.'' We recognize that there are highly sensitive individuals with celiac disease who may not be fully protected if they consume foods containing a trace level of gluten above 0.01 ppm but below 20 ppm. Therefore, we are seeking comments on whether a ''gluten free'' claim based on a < 20 ppm threshold should be accompanied by a qualifying statement. FDA has tentatively concluded, however, that < 20 ppm gluten is the appropriate threshold level to use as a criterion to define the food labeling term ''gluten-free.'' As previously noted, FDA is concerned that adoption of a gluten threshold level that is lower than < 20 ppm may have the unintended and unwanted effect of making it more difficult for those with celiac disease to adhere to a life-long ''gluten-free'' diet, thereby putting those individuals at increased risk of developing serious health complications and other diseases associated with celiac disease.

FDA's concern is based on questions about whether food manufacturers of multi-ingredient foods, especially grain-based products, could comply with a gluten threshold level much lower than < 20 ppm. Even if a lower gluten threshold level could be enforced, we do not know if it would: (1) Influence some U.S. food manufacturers to discontinue labeling their products ''gluten-free'' because they cannot consistently and reliably meet a lower gluten threshold level, (2) discourage other U.S. food companies from becoming manufacturers of foods labeled ''gluten-free,'' (3) result in a significant increase in the cost of foods labeled ''gluten-free,'' or (4) negatively affect international trade of foods labeled ''gluten-free,'' thereby affecting the availability of certain foods to those individuals with celiac disease.

Therefore, FDA invites comments, supported by data and any other information, on the potential impact the adoption a gluten threshold level lower than < 20 ppm as a criterion to define the term ''gluten-free'' might have on manufacturers of foods labeled ''gluten-free'' and on celiac disease consumers of those foods.

FDA seeks to define the term ''gluten-free'' to assist as many individuals with celiac disease as possible in identifying foods that they can eat without experiencing adverse health effects. If FDA adopts the proposed < 20 ppm gluten threshold level as one of the criteria to define the term ''gluten-free'' in the final rule, the Agency will remain open to the feasibility and desirability of revising this criterion as more sensitive methods to detect gluten become available or if FDA determines in the future that further research on celiac disease indicates that the adoption of a lower gluten threshold level for foods labeled ''gluten-free'' is warranted to be

adequately protective of the celiac disease population. FDA is interested in receiving data and comments that will help identify the proportion of the population of individuals with celiac disease that may experience adverse health effects as a result of exposure to gluten at levels between 0.01 ppm and < 20 ppm.

C. Gluten Threshold to Define, in Part, the Term ''Low-Gluten''

In the proposed rule (72 FR 2795 at 2804), we noted that Australia and New Zealand have developed a two-tiered approach to gluten-related food labeling by setting regulatory standards for ''gluten-free,'' meaning no detectable gluten, and ''low-gluten,'' meaning no more than 20 mg gluten per 100 g of the food (which is equivalent to no more than 200 ppm gluten in the food). In the Preliminary Regulatory Impact Analysis section (72 FR 2795 at 2811 and 2812) and the Regulatory Flexibility Analysis section (72 FR 2795 at 2813) of the proposed rule, we evaluated an alternative regulatory option (referred to as ''Option 6''), under which we would define and allow in food labeling both of the claims ''low gluten'' and ''gluten free.'' The ''Option 6'' analysis used < 20 ppm gluten as a criterion for defining the term ''gluten-free,'' with the suggestion that an amount higher than 20 ppm would be specified as a criterion for defining the term ''low-gluten.'' The proposed rule did not identify any specific amount of gluten to define the term ''low-gluten'' because we did not have sufficient scientific data to recommend such a level, nor does FDA have such data today.

In light of the findings of FDA's safety assessment and the discussion in this **Federal Register** document of factors that could influence the Agency's decision on how to define the term ''gluten-free,'' FDA believes that it would be helpful to again solicit comments about any reasons that would support a gluten threshold level to define, in part, the food labeling claim ''low-gluten.'' If such reasons exist, FDA is also seeking comments on the specific gluten threshold level and any other criteria that the Agency should use to define the term ''low-gluten.''

IV. Request for Comments

In addition to comments on the issues raised elsewhere in this **Federal Register** document, we are interested in any data and information not identified in this **Federal Register** document, the Gluten Report, or the proposed rule, that we should consider in establishing a gluten threshold level as one of the criteria to define the food labeling term ''gluten free.''

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. 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.

VI. Electronic Access

Persons with access to the Internet may obtain FDA's report on the health hazard assessment it conducted, the Gluten Report, at *http://www.fda.gov/downloads/Food/ScienceReseacrh/ReseacrhAreas/RiskAssessmentSafetyAssessment/UCM264152.pdf*.

VII. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site addresses but FDA is not responsible for subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

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4. Codex Alimentarius Commission, ''Codex Standard for Foods for Special Dietary Use for Persons Intolerant to Gluten (Codex Stan 118–1979),'' Rome, Italy, pp. 1–3, 2008; accessible at *http://www.codexalimentarius.net/download/standards/291/cxs_118e.pdf.*
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8. Garber, E, Memorandum, ''ELISA Methods Used to Detect Gluten in Foods,'' Center for Food Safety and Applied Nutrition, Food and Drug Administration, College Park, MD, July 15, 2011.
9. Office of Food Safety, ''Health Hazard Assessment for Gluten Exposure in Individuals with Celiac Disease: Determination of Tolerable Daily Intake Levels and Levels of Concern for Gluten,'' Center for Food Safety and Applied Nutrition, Food and Drug Administration, College Park, MD, May 2011; accessible at *http://www.fda.gov/downloads/Food/ScienceReseacrh/ReseacrhAreas/RiskAssessmentSafetyAssessment/UCM264152.pdf.*
10. U.S. Department of Agriculture, Agricultural Research Service, Beltsville Human Nutrition Research Center, Food Surveys Research Group (Beltsville, MD), ''Continuing Survey of Food Intakes by Individuals 1994–96, 1998 and Diet and Health Knowledge Survey 1994–96: Documentation'' (*csfii9498_documentationupdated.pdf*) or Data Files (*csfii9498_data.exe*); accessible at *http://www.ars.usda.gov/Services/docs.htm?docid=14531.*
11. Codex Alimentarius Web site, ''Welcome'' Web page, *http://www.codexalimentarius.net/web/index_en.jsp*, accessed July 1, 2011.
12. Codex Alimentarius Web site, ''Membership of the Commission'' Web page, *http://www.codexalimentarius.net/web/members.jsp?lang=EN*, accessed July 1, 2011.
13. The Commission of the European Communities, ''Commission Regulation (EC) No 41/209,'' *Official Journal of the European Union,* Brussels, Belgium, pp. L 16/3–L 16/5, January 20, 2009; accessible at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:016:0003:0005:EN:PDF.*
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europa.eu/about-eu/countries/index_en.htm, July 1, 2011.
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Dated: July 28, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–19620 Filed 8–2–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 40 and 49

[REG–112841–10]

RIN 1545–BJ40

Indoor Tanning Services; Cosmetic Services Excise Taxes

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of public hearing on proposed rulemaking providing guidance on the indoor tanning services excise tax imposed by the Patient Protection and Affordable Care Act. These regulations affect users and providers of indoor tanning services.

DATES: The public hearing is being held on Tuesday, October 11, 2011, at 10 a.m. The IRS must receive outlines of the topics to be discussed at the public hearing by September 28, 2011.

ADDRESSES: The public hearing is being held in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, DC 20224. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building.

Mail outlines to CC:PA:LPD:PR (REG–112841–10), Room 5205, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–112841–10), Couriers Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS–REG–112841–10).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Michael H. Beker at (202) 622–3130; concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the hearing Regina Johnson at (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is the notice of proposed rulemaking (REG–112841–10) that was published in the **Federal Register** on Tuesday, June 15, 2010 (75 FR 33740). The notice also announced that a hearing will be scheduled if requested by the public in writing by September 13, 2010.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline has passed, persons who have submitted written comments and wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (a signed original and four copies) by September 28, 2010.

The IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available free of charge, at the hearing. Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this document.

LaNita Van Dyke,

Branch Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2011–19597 Filed 8–2–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[REG–120391–10]

RIN 1545–BJ58

Requirements for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: Elsewhere in this issue of the **Federal Register**, the IRS is issuing an amendment to temporary regulations published July 19, 2010, under the provisions of the Patient Protection and Affordable Care Act (the Affordable Care Act) relating to coverage of preventive services without any participant cost sharing. The IRS is issuing the temporary regulations at the same time that the Employee Benefits Security Administration of the U.S. Department of Labor and the Center for Consumer Information & Insurance Oversight of the U.S. Department of Health and Human Services are issuing a substantially similar amendment to interim final regulations published July 19, 2010 with respect to group health plans and health insurance coverage offered in connection with a group health plan under the Employee Retirement Income Security Act of 1974 and the Public Health Service Act. The temporary regulations provide guidance to employers, group health plans, and health insurance issuers providing group health insurance coverage. The text of those temporary regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by October 3, 2011.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–120391–10), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered to: CC:PA:LPD:PR (REG–120391–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224. Alternatively, taxpayers may submit comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–120391–10).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Karen Levin at 202–622–6080; concerning submissions of comments, Treena Garrett at 202–622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

The temporary regulations published elsewhere in this issue of the **Federal Register** amend § 54.9815–2713T of the Miscellaneous Excise Tax Regulations. The proposed and temporary regulations are being published as part of a joint rulemaking with the Department of Labor and the Department of Health and Human Services (the joint rulemaking). The text of those temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information requirement on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. Comments are specifically requested on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Karen Levin, Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), IRS. The proposed regulations, as well as the temporary regulations, have been developed in coordination with personnel from the U.S. Department of Labor and the U.S. Department of Health and Human Services.

List of Subjects in 26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 54, as proposed to be amended on July 19, 2010, at 75 FR 41787. is further proposed to be amended as follows:

PART 54—PENSION EXCISE TAXES

Paragraph 1. The authority citation for part 54 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 54.9815–2713, as proposed to be added at 75 FR 41788, July 19, 2010, is amended by revising paragraph (a)(1)(iv) to read as follows:

§ 54.9815–2713 Coverage of preventive health services.

(a) * * *

(1) * * *

(iv) [The text of proposed § 54.9815–2713(a)(1)(iv) is the same as the text of § 54.9815–2713T(a)(1)(iv) published elsewhere in this issue of the **Federal Register**].

* * * * *

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2011–19685 Filed 8–1–11; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 721

[EPA–HQ–OPPT–2011–0108; FRL–8878–3]

RIN 2070–AB27

Tris carbamoyl triazine; Proposed Modification of Significant New Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Under section 5(a)(2) of the Toxic Substances Control Act (TSCA), EPA is proposing to amend the significant new use rule (SNUR) for the chemical substance identified generically as tris carbamoyl triazine, which was the subject to premanufacture notice (PMN) P–95–1098. This action would amend the SNUR to allow certain uses without requiring a significant new use notice (SNUN), and would extend SNUN requirements to certain additional uses. EPA is proposing this amendment based on review of new toxicity test data.

DATES: Comments must be received on or before September 2, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2011–0108, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. *Attention:* Docket ID Number EPA–HQ–OPPT–2011–0108. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2011–0108. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information

whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *regulations.gov* or e-mail. The *regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Tracey Klosterman, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (202) 564–2209; *e-mail address: klosterman.tracey@epa.gov.*

For general information contact: The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; *telephone number:* (202) 554–1404; *e-mail address: TSCA–Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture, import, process, or use the chemical substance identified generically as tris carbamoyl triazine (PMN P–95–1098). Potentially affected entities may include, but are not limited to:

- Manufacturers, importers, or processors of the subject chemical substance (NAICS codes 325 and 324110), *e.g.,* chemical manufacturers and petroleum refineries.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in § 721.5. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Chemical importers are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements promulgated at 19 CFR 12.118 through 12.127; see also 19 CFR 127.28. Chemical importers must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA. Importers of chemicals subject to a final SNUR must certify their compliance with the SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)) (see § 721.20), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What action is the agency taking?

In the **Federal Register** of August 20, 1998 (63 FR 44562) (FRL–5788–7), EPA published a final SNUR (codified at § 721.9719) for the chemical substance identified generically as tris carbamoyl triazine (PMN P–95–1098), in accordance with the procedures at § 721.160.

EPA is proposing to amend the requirements of the SNUR as detailed in

this unit. The modified SNUR would require persons who intend to manufacture, import, or process the chemical substance for an activity designated as a significant new use to notify EPA at least 90 days before commencing that activity. The docket established for this proposed SNUR is available under docket ID number EPA–HQ–OPPT–2011–0108. The docket includes information considered by the Agency in developing the final rule and the modified TSCA section 5(e) consent order negotiated with the PMN submitter.

PMN Number P–95–1098

Chemical name: Tris carbamoyl triazine (generic).

CAS number: Not available.

Effective date of the TSCA section 5(e) consent order: April 25, 1997.

Effective date of the modified TSCA section 5(e) consent order: December 1, 2010.

Federal Register *publication date and reference for the final SNUR:* August 20, 1998 (63 FR 44562).

Basis for the modified TSCA section 5(e) consent order: The generic (non-confidential) use of the PMN substance is as a cross linking resin. The original TSCA section 5(e) consent order was issued under sections 5(e)(1)(A)(i), 5(e)(1)(A)(ii)(I), and 5(e)(1)(A)(ii)(II) based on the findings that the chemical substance may present an unreasonable risk of injury to the environment, that it will be produced in substantial quantities, and there may be significant or substantial human exposure to the chemical substance. The original 5(e) consent order required establishment of a hazard communication program; established a maximum manufacture and importation volume limit for submission of required human health testing; and prohibited purposeful or predictable releases of the PMN substance in concentrations that exceed 40 parts per billion (ppb) in surface waters. The proposed SNUR for this chemical substance is based on and consistent with the provisions of the modified TSCA section 5(e) consent order, discussed below. The proposed SNUR designates as a ''significant new use'' the absence of the protective measures required in the corresponding modified consent order.

Human Health Toxicity Concerns: During the initial PMN review process, EPA established a no-observable-effect level (NOEL) of 15 mg/kg/day and a lowest-observable-effect level (LOEL) of 150 mg/kg/day for systemic effects based on the results of a 28-day inhalation study in rats on the PMN substance, but did not determine that the PMN substance may present an unreasonable risk to human health as a result of expected exposure. However, the TSCA section 5(e) consent order required the PMN submitter to complete and submit a prenatal developmental toxicity study at a certain production volume limit. This is consistent with the exposure-based finding pursuant to section 5(e)(1)(A)(ii)(II) of TSCA. The PMN submitter completed this study and based on the results the Agency established a NOEL of 30 mg/kg/day for maternal toxicity and 1,000 mg/kg/day for fetal toxicity. Using the results from both this prenatal developmental study and the earlier 28-day study, the Agency then reevaluated the predicted workplace exposures and determined that there may be an unreasonable risk of maternal and systemic toxicity resulting from unprotected inhalation exposure to the PMN substance.

Ecotoxicity Concerns: In addition, to address Agency environmental concerns, the PMN submitter completed a fish early-life stage toxicity test and a daphnid chronic toxicity test on the PMN substance. During the initial review of the PMN, EPA's preliminary Ecological Structural Activity Relationship (EcoSAR) analysis of test data on structurally analogous substances resulted in a predicted toxicity to aquatic organisms at concentrations that exceed the concentration of concern (COC) of 40 ppb of the PMN substance in surface waters. Based on the results of the submitted fish and daphnid tests, fish were identified as the most sensitive species and a revised COC for aquatic toxicity of 66 ppb was established. Based on the revised COC, EPA then performed environmental modeling assessments for the PMN releases to surface waters and determined that the new COC would not be exceeded under expected conditions of manufacture, import, processing, distribution in commerce, use or disposal of the PMN substance.

The Agency concluded, after examining this new information and reexamining the test data and other information supporting its findings under section 5(e)(1)(A)(ii)(I) of TSCA in the original TSCA section 5(e) consent order, that the finding that certain activities involving the substance may present an unreasonable risk of injury to the environment is no longer supported. The Agency also concluded that certain additional activities involving the substance may present an unreasonable risk of injury to human health, pursuant to 5(e)(1)(A)(ii)(I). To conform with these findings and to protect against the remaining potential risks, the Agency has modified the TSCA section 5(e) consent order (''modified order''); these modifications became effective on December 1, 2010. The modified TSCA section 5(e) consent order:

1. Identifies those forms of the PMN substance that are exempt from the provisions of the consent order. These exemptions apply to quantities of the PMN substance after it has been completely reacted (cured).
2. Adds protection in the workplace requirements for respiratory protection and alternative New Chemical Exposure Limit (NCEL) exposure monitoring to address the newly-identified potential risks from inhalation exposure in the workplace.
3. Revises the hazard communication requirements to add the human health hazard and exposures and remove the environmental hazards and exposures.
4. Removes all release to water requirements.
5. Revises the recordkeeping requirements to reflect the aforementioned modified consent order requirements.

The proposed rule would conform to the scope of the significant new uses in the SNUR to mirror the modified consent order.

Recommended testing: EPA has determined that the results of the 90-day inhalation toxicity test in rats (OPPTS Test Guideline 870.3465) would help further characterize the human health effects of the PMN substance. The modified TSCA section 5(e) consent order does not require submission of the aforementioned information at any specified time or production volume. However, the order's restrictions on manufacturing, import, processing, distribution in commerce, use and disposal of the PMN substance will remain in effect until the order is modified or revoked by EPA based on submission of that or other relevant information.

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

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use.'' EPA must make this determination by rule after considering all relevant factors, including the TSCA section 5(a)(2) factors, listed in Unit III. of this document. Once EPA determines that a use of a chemical substance is a significant new use, TSCA section 5(a)(1)(B) and 40 CFR part 721 requires persons to submit a significant new use notice (SNUN) to EPA at least 90 days before they manufacture, import, or process the chemical substance for that

use. Persons who must report are described in § 721.5.

EPA may respond to SNUNs by, among other things, issuing or modifying a TSCA section 5(e) consent order and/or amending the SNUR promulgated under TSCA section 5(a)(2). Amendment of the SNUR will often be necessary to allow persons other than the SNUN submitter to engage in the newly authorized use(s), because even after a person submits a SNUN and the review period expires, other persons still must submit a SNUN before manufacturing on processing for the significant new use. Procedures and criteria for modifying or revoking SNUR requirements appear at § 721.185.

III. Significant New Use Determination

Section 5(a)(2) of TSCA states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure to human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In addition to these factors enumerated in TSCA section 5(a)(2), the statute authorizes EPA to consider any other relevant factors.

To determine what would constitute a significant new use for the chemical substance identified generically as Tris carbamoyl triazine (PMN P–95–1098), EPA considered relevant information about the toxicity of the chemical substance, likely human exposures and environmental releases associated with possible uses, taking into consideration the four bulleted TSCA section 5(a)(2) factors listed in this unit.

IV. Rationale for the Proposed Rule

During review of PMN P–95–1098, the chemical substance identified generically as tris carbamoyl triazine, EPA concluded that regulation was warranted under TSCA section 5(e), pending the development of information sufficient to make reasoned evaluations of the health or environmental effects of this chemical substance. The basis for such findings is outlined in Unit II. of this notice and in the **Federal Register** document of August 20, 1998 (63 FR 44562) (FRL–5788–7). Based on these findings, a TSCA section 5(e) consent order requiring the use of appropriate exposure controls were negotiated with the PMN submitter. The SNUR provisions for this chemical substance are consistent with the provisions of the original TSCA section 5(e) consent order. This SNUR was promulgated pursuant to § 721.160.

After the review of test data submitted pursuant to the TSCA section 5(e) consent order for P–95–1098 (see Unit II.) and consideration of the factors included in TSCA section 5(a)(2) (see Unit III.), EPA determined that the chemical substance may pose an unreasonable risk to human health, but no longer may present an unreasonable risk to the environment. Consequently, EPA is proposing this modification to the SNUR at § 721.9719 according to procedures in §§ 721.160 and 721.185 so that SNUR provisions for this chemical substance remain consistent with the provisions of the TSCA section 5(e) consent order, as modified.

V. Applicability of Proposed Rule to Uses Occurring Before Effective Date of the Final Rule

To establish a significant ''new'' use, EPA must determine that the use is not ongoing. EPA solicits comments on whether any of the uses proposed as significant new uses are ongoing. As discussed in the **Federal Register** of April 24, 1990 (55 FR 17376), EPA has decided that the intent of section 5(a)(1)(B) of TSCA is best served by designating a use as a significant new use as of the date of publication of the proposed rule, rather than as of the effective date of the final rule. If uses begun after publication of the proposed rule were considered ongoing rather than new, it would be difficult for EPA to establish SNUR notice requirements, because a person could defeat the SNUR by initiating the significant new use before the rule became final, and then argue that the use was ongoing as of the effective date of the final rule.

Thus, any persons who begin commercial manufacture, import, or processing activities with the chemical substances that are not currently a significant new use under the current rule but which would be regulated as a ''significant new use'' if this proposed rule if this rule is finalized, must cease any such activity as of the effective date of the rule if and when finalized. To resume their activities, these persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expires.

EPA has promulgated provisions to allow persons to comply with this SNUR before the effective date. If a person were to meet the conditions of advance compliance under § 721.45(h), the person would be considered to have met the requirements of the final SNUR for those activities.

VI. Test Data and Other Information

EPA recognizes that TSCA section 5 does not require the development of any particular test data before submission of a SNUN. There are two exceptions:

1. Development of test data is required where the chemical substance subject to the SNUR is also subject to a test rule under TSCA section 4 (see TSCA section 5(b)(1)).
2. Development of test data may be necessary where the chemical substance has been listed under TSCA section 5(b)(4) (see TSCA section 5(b)(2)).

In the absence of a TSCA section 4 test rule or a TSCA section 5(b)(4) listing covering the chemical substance, persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them (see § 720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing. In this case, EPA recommends persons, before performing any testing, to consult with the Agency pertaining to protocol selection. To access the Harmonized Test Guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select ''Test Methods and Guidelines.''

The modified TSCA section 5(e) consent order for the chemical substance that would be regulated under this proposed rule does not require submission of the test at any specified time or volume. However, the restrictions on manufacture, import, processing, distribution in commerce, use and disposal of the PMN substance would remain in effect until the consent order is modified or revoked by EPA based on submission of that or other relevant information. These restricted activities cannot be commenced unless the PMN submitter first submits the results of toxicity tests that would permit a reasoned evaluation of the potential risks posed by this chemical substance. The test specified in the modified TSCA section 5(e) consent order is included in Unit II. The proposed SNUR would contain the same restrictions as the modified TSCA section 5(e) consent order. Persons who intend to commence non-exempt commercial manufacture, import, or processing for those activities proposed as significant new uses would be

required to notify the Agency by submitting a SNUN at least 90 days in advance of commencement of those activities.

The recommended testing specified in Unit II. of this document may not be the only means of addressing the potential risks of the chemical substance. However, SNUNs submitted without any test data may increase the likelihood that EPA will take action under TSCA section 5(e), particularly if satisfactory test results have not been obtained from a prior PMN or SNUN submitter. EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on the following:

- Human exposure and environmental release that may result from the significant new use of the chemical substance.
- Potential benefits of the chemical substance.
- Information on risks posed by the chemical substance compared to risks posed by potential substitutes.

VII. SNUN Submissions

According to 40 CFR 721.1(c), persons submitting a SNUN must comply with the same notice requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in § 720.50. SNUNs must be on EPA Form No. 7710–25, generated using e-PMN software, and submitted to the Agency in accordance with the procedures set forth in §§ 721.25 and 720.40. E–PMN software is available electronically at *http://www.epa.gov/opptintr/newchems.*

VIII. Economic Analysis

EPA evaluated the potential costs of establishing SNUN requirements for potential manufacturers, importers, and processors of the chemical substances during the development of the direct final rule. The Agency's complete Economic Analysis is available in the docket under docket ID number EPA–HQ–OPPT–2011–0108.

IX. Statutory and Executive Order Reviews

A. Executive Order 12866

This proposed rule would modify a SNUR for a chemical substance that is the subject of a PMN and TSCA section 5(e) consent order. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993).

B. Paperwork Reduction Act

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* an Agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under the PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register,** are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable. EPA is amending the table in 40 CFR part 9 to list the OMB approval number for the information collection requirements contained in this proposed rule. This listing of the OMB control numbers and their subsequent codification in the CFR satisfies the display requirements of PRA and OMB's implementing regulations at 5 CFR part 1320. This Information Collection Request (ICR) was previously subject to public notice and comment prior to OMB approval, and given the technical nature of the table, EPA finds that further notice and comment to amend it is unnecessary. As a result, EPA finds that there is ''good cause'' under section 553(b)(3)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), to amend this table without further notice and comment.

The information collection requirements related to this action have already been approved by OMB pursuant to PRA under OMB control number 2070–0012 (EPA ICR No. 574). This action would not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Collection Strategies Division, Office of Environmental Information (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

C. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that promulgation of this SNUR would not have a significant adverse economic impact on a substantial number of small entities. The rationale supporting this conclusion is discussed in this unit. The requirement to submit a SNUN applies to any person (including small or large entities) who intends to engage in any activity described in the rule as a ''significant new use.'' Because these uses are ''new,'' based on all information currently available to EPA, it appears that no small or large entities presently engage in such activities. A SNUR requires that any person who intends to engage in such activity in the future must first notify EPA by submitting a SNUN. Although some small entities may decide to pursue a significant new use in the future, EPA cannot presently determine how many, if any, there may be. However, EPA's experience to date is that, in response to the promulgation of SNURs covering over 1,000 chemicals, the Agency receives only a handful of notices per year. For example, the number of SNUNs was four in Federal fiscal year 2005, eight in FY2006, six in FY2007, eight in FY2008, and seven in FY2009. During this five-year period, three small entities submitted a SNUN. In addition, the estimated reporting cost for submission of a SNUN (see Unit VIII.) is minimal regardless of the size of the firm. Therefore, the potential economic impacts of complying with this SNUR would not be expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published in the **Federal Register** of June 2, 1997 (62 FR 29684) (FRL–5597–1), the Agency presented its general determination that final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

D. Unfunded Mandates Reform Act

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reason to believe that any State, local, or Tribal government would be impacted by this proposed rule. As such, EPA has determined that this proposed rule would not impose any enforceable duty,

contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of sections 202, 203, 204, or 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

E. Executive Order 13132

This action would not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999).

F. Executive Order 13175

This proposed rule would not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This proposed rule would not significantly nor uniquely affect the communities of Indian Tribal governments, nor would it involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000), do not apply to this proposed rule.

G. Executive Order 13045

This action is not subject to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

H. Executive Order 13211

This proposed rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use and because this action is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

In addition, since this action does not involve any technical standards, section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), does not apply to this action.

J. Executive Order 12898

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: July 22, 2011.

Wendy C. Hamnett,

Director, Office of Pollution Prevention and Toxics.

Therefore, 40 CFR part 721 is proposed to be amended as follows:

PART 721—[AMENDED]

1. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

2. Amend § 721.9719 as follows:

a. Revise the section heading.

b. Revise paragraphs (a)(1), (a)(2)(i), and (a)(2)(ii).

c. Remove paragraph (a)(2)(iii).

d. Revise paragraph (b)(1).

e. Remove paragraph (b)(3).

The revisions and addition read as follows:

§ 721.9719 Tris carbamoyl triazine.

(a) * * *

(1) The chemical substance identified generically as tris carbamoyl triazine (PMN P–95–1098) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section. The requirements of this rule do not apply to quantities of the chemical substance after it has been completely reacted (cured).

(2) * * *

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(4), (a)(5), (a)(6)(v), (b) (concentration set at 1.0 percent), and (c). Respirators must provide a National Institute for Occupational Safety and Health (NIOSH) assigned protection factor (APF) of at least 5. As an alternative to the respiratory requirements listed, a manufacturer, importer, or processor may choose to follow the new chemical exposure limit (NCEL) provisions listed in the Toxic Substances Control Act (TSCA) section 5(e) consent order for this substance. The NCEL is 1.0 mg/m^3 as an 8-hour time weighted average. Persons who wish to pursue NCELs as an alternative to the § 721.63 respirator requirements may request to do so under § 721.30. Persons whose § 721.30 requests to use the NCELs approach are approved by EPA will receive NCELs provisions comparable to those contained in the corresponding section 5(e) consent order. The following NIOSH-certified respirators meet the requirements for § 721.63(a)(4):

(A) Air purifying, tight-fitting half-face respirator equipped with the appropriate combination cartridges; cartridges should be tested and approved for the gas/vapor substance (*i.e.,* organic vapor, acid gas, or substance-specific cartridge) and should include a particulate filter (N100 if oil aerosols are absent, R100, or P100);

(B) Air purifying, tight-fitting full-face respirator equipped with the appropriate combination cartridges, cartridges should be tested and approved for the gas/vapor substance (*i.e.,* organic vapor, acid gas, or substance-specific cartridge) and should include a particulate filter (N100 if oil aerosols are absent, R100, or P100);

(C) Powered air-purifying respirator equipped with loose-fitting hood or helmet equipped with a High Efficiency Particulate Air (HEPA) filter; powered air-purifying respirator equipped with tight-fitting facepiece (either half-face or full-face) equipped with a High Efficiency Particulate Air (HEPA) filter;

(D) Supplied-air respirator operated in pressure demand or continuous flow mode and equipped with a hood or helmet, or tight-fitting face piece (either half-face or full-face).

(ii) *Hazard communication program.* Requirements as specified in § 721.72 (a), (b), (c), (d), (e) (concentration set at 1.0 percent), (f), (g)(1)(ii), (g)(1)(iv), (g)(1)(ix), (g)(2)(ii), (g)(2)(iv), and (g)(5).

(b) * * *

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (f), (g), and (h) are applicable to manufacturers, importers, and processors of this substance.

* * * * *

[FR Doc. 2011–19412 Filed 8–2–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 430, 433, 447, and 457

[CMS–2292–P]

RIN 0938–AQ32

Medicaid and Children's Health Insurance Programs; Disallowance of Claims for FFP and Technical Corrections

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule reflects the Centers for Medicare and Medicaid Services' commitment to the general principles of the President's Executive Order 13563 released January 18, 2011, entitled ''Improving Regulation and Regulatory Review,'' as this rule would: implement a new reconsideration process for administrative determinations to disallow claims for Federal financial participation (FFP) under title XIX of the Act (Medicaid); lengthen the time States have to credit the Federal Government for identified but uncollected Medicaid provider overpayments and provide that interest will be due on amounts not credited within that time period; make conforming changes to the Medicaid and Children's Health Insurance Program (CHIP) disallowance process to allow States the option to retain disputed Federal funds through the new administrative reconsideration process; revise installment repayment standards and schedules for States that owe significant amounts; provide that interest charges may accrue during the new administrative reconsideration process if a State chooses to retain the funds during that period. This proposed rule would also make a technical correction to reporting requirements for disproportionate share hospital payments, revise internal delegations of authority to reflect current CMS structure, remove obsolete language, and correct other technical errors.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on September 2, 2011.

ADDRESSES: In commenting, please refer to file code CMS–2292–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the ''More Search Options'' tab.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–2292–P, P.O. Box 8016, Baltimore, MD 21244–8016 .

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–2292–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by following the instructions at the end of the ''Collection of Information Requirements'' section in this document.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT:

Robert Lane, (410) 786–2015, or Lisa Carroll, (410) 786–2696, for general information.

Edgar Davies, (410) 786–3280, for Overpayments.

Claudia Simonson, (312) 353–2115, for Overpayments resulting from Fraud.

Rory Howe, (410) 786–4878, for Upper Payment Limit and Disproportionate Share Hospital.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

Title XIX of the Social Security Act (the Act) authorizes Federal grants to States to jointly fund programs that provide medical assistance to low-income families, the elderly, and persons with disabilities. This Federal-State partnership is administered by each State in accordance with an approved State plan. States have considerable flexibility in designing their programs, but must comply with Federal requirements specified in the Medicaid statute, regulations, and interpretive agency guidance. Federal financial participation (FFP) is available for State medical assistance expenditures, and administrative expenditures related to operating the State Medicaid program, that are authorized under Federal law and the approved State plan.

Section 490l of the Balanced Budget Act of 1997 (Pub. L. 105–33, enacted on August 5, 1997) (BBA), added title XXI

to the Social Security Act (the Act) which authorizes the Children's Health Insurance Program (CHIP) to jointly fund State efforts to initiate and expand the provision of child health assistance to uninsured, low-income children. Such assistance is primarily provided by obtaining health benefits coverage through (1) a separate child health program that meets the requirements specified under section 2103 of the Act; (2) expanded eligibility for benefits under the State's Medicaid plan under title XIX of the Act; or (3) a combination of the two approaches. Available Federal funding is limited to an annual allotment. To be eligible for Federal funds under title XXI of the Act, States must submit a State child health plan, which must be approved by the Secretary.

Prior to the passage of the Medicare Improvement for Patients and Providers Act of 2008 (Pub. L. 110–275, enacted on July 15, 2008) (MIPPA) in 2008, the administrative review of Medicaid claims for FFP that CMS has disallowed (disallowances) was governed by section 1116(d) of the Act, which provided simply that States were entitled to a reconsideration of any disallowance. The current regulations, as discussed below, delegated that reconsideration to the HHS Departmental Appeals Board (Board).

Section 2107(e)(2)(B) of the Act makes section 1116 of the Act applicable to CHIP, to the same extent as it is applicable to Medicaid, with respect to administrative review, unless inconsistent with the CHIP statute. As a result, the same basic administrative review process, with reconsideration through the Board process, was made applicable by regulation to CHIP.

In section 204 of the MIPPA, section 1116(d) of the Act was amended to remove Medicaid (and by implication CHIP) from the section 1116(d) process, and a new section 1116(e) of the Act was added to set forth a Medicaid-specific (and by implication CHIP) administrative review process.

This new section 1116(e) of the Act added by MIPPA provides that the State shall be entitled to and, upon request, shall receive a reconsideration of the disallowance, provided that such request is made during the 60-day period that begins on the date the State receives notice of the disallowance. In addition, a State may appeal, in whole or in part, a disallowance by the Secretary, or an unfavorable reconsideration of a disallowance, to the Board by filing a notice of appeal with the Board during the 60-day period that begins on the date the State receives notice of the disallowance or of the unfavorable reconsideration.

The current rules setting forth the process for administrative review for determinations that State claims for Federal funding are not allowable (disallowances) are set out in the Medicaid program at § 430.42 and for the CHIP program at § 457.212. Those rules set out a process for disallowance of FFP and provide for reconsideration of disallowances by the HHS Board using procedures set forth in 45 CFR part 16. The rules provide a framework, which has been used by the Department for resolution of an increasing range of disputes.

Section 6506 of the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010) (the Affordable Care Act) amended section 1903(d)(2) of the Act to extend the period from 60 days to 1 year for which a State may collect an overpayment from providers before having to return the Federal funds. This section also provides for additional time beyond the 1 year for States to recover debts due to fraud when a final judgment (including a final determination on an appeal) is pending.

II. Provisions of the Proposed Rule

This proposed rule would revise regulatory provisions in 42 CFR parts 430, 433, 447, and 457.

A. Administrative Review of Determinations to Disallow Claims for FFP

Section 204 of the MIPPA (Review of Administrative Claim Determination) amended section 1116 of the Act by striking ''title XIX'' from section 1116(d) of the Act and adding section 1116(e) of the Act which provides language that States may obtain review by the Board of an agency decision or reconsidered agency decision. Therefore, we are proposing to revise § 430.42 to set forth new procedures to review administrative determinations to disallow claims for FFP. These new procedures would provide for the availability of an informal agency reconsideration and a formal adjudication by the HHS Board.

Specifically, § 430.42(b) would provide States the option to request administrative reconsideration of an initial determination of a Medicaid disallowance. These revisions identify timeframes for the reconsideration process. The timeframes that we are proposing are short because we view this reconsideration process to be a quick and efficient process for States to point out clear errors or omissions in disallowance determinations, relating either to facts or policy interpretations, that can be corrected before the parties incur further time and expense in an appeal to the Board. Disputes that involve complex fact-finding or issues of legal authority are not appropriate for this expedited review process.

Section 430.42(c) describes the procedures for such a reconsideration, § 430.42(d) describes the option for a State to withdraw a reconsideration request, and § 430.42(e) describes the procedures for issuing reconsideration decisions and implementing such decisions. We propose that neither the State nor CMS will be limited to a record developed in the reconsideration process in any further appeal of the matter. This is consistent with the provisions of section 1116(e)(2)(B) of the Act which provides for the Board to consider ''such documentation as the State may submit and as the Board may require'' including ''all relevant evidence.''

Because section 1116(e)(2)(B) of the Act clarifies that the Board decision (and by implication the reconsideration decision) is to be based on documentation submitted by the State, we include a statement in the proposed regulations reflecting the existing principle that the State is responsible for documenting the allowability of its claims for FFP. Because the Medicaid program is State-administered, the State is in possession of the underlying factual information on its claims, and therefore, has the responsibility of documenting submitted claims. This is not a new principle, and is currently applied by the Board in reviewing disallowance determinations, but it is important to reiterate this point to make clear how the reconsideration and review process will operate.

Section 430.42(f) provides States the option of appeal to the Board of either an initial determination of a Medicaid disallowance, or the reconsideration of such a determination under § 430.42(b). The procedures for such an appeal are set forth in § 430.42(g). For this purpose, we have proposed that the Board shall follow the procedures set forth in its regulations at 45 CFR part 16, but we have included language from section 1116(e)(2)(B) of the Act to describe the scope of the Board review to include ''a thorough review of the issues, taking into account all relevant evidence, including such documentation as the State may submit and as the Board may require.'' In § 430.42(h), we set forth the procedure for issuance and implementation of the final decision.

B. State Option To Retain Federal Funds Pending Administrative Review and Interest Charges on Properly Disallowed Funds Retained by the State

Section 204 of the MIPPA (Review of Administrative Claim Determination) amended section 1116 of the Act by striking ''title XIX'' from section 1116(d) of the Act and adding section 1116(e) of the Act which provides language that the States may obtain review by the Board of an agency decision or reconsidered agency decision. Section 1903(d)(5) of the Act gives a State the option of retaining the amount of Federal payment in controversy when such payment has been disallowed by the Secretary pending a final administrative determination upon review. In other words, the statute provides a State the option of retaining (or returning) the entire amount of Federal payment that has been disallowed, while that disallowance is being reconsidered by the agency, or under appeal to the Board. If a final administrative determination has been made upholding the disallowance, the State must return all disallowed amounts with interest ''for the period beginning on the date such amount was disallowed and ending on the date of such final determination.''

Specifically, we propose to revise § 433.38 to clarify the application of interest when the State opts to retain Federal funds. These regulations specify the procedures that CMS and a State must follow when the State chooses to retain the funds pending a final administrative determination. The current regulations provide that a State that chooses to retain the disallowed funds during an appeal to the Board is required to pay interest on any portion of the disallowance that is ultimately sustained by the Board. Section 433.38 would be revised to add language clarifying that interest would accrue on disallowed claims of FFP during both the reconsideration process and the Board appeal process. We are also providing clarifying language regarding interest charged on disallowed claims during the repayment of Federal funds by installments. If a State chooses to retain the FFP when a claim is disallowed and appeals the disallowance, the interest will continue to accrue through the reconsideration and the Board decision. If the disallowance is upheld, the State may request a repayment of FFP by installments.

We are also proposing two options for the repayment of interest that accrues from the date of the disallowance notice until the final Board decision when a State elects repayment by installments. It has consistently been our policy that once the State has exhausted all of its administrative appeal rights and the disallowance has been upheld, the principal overpayment amount plus interest through the date of final determination becomes the new overpayment amount. We are proposing to provide States with an additional option for repaying that interest during a repayment schedule. Given States' current fiscal situation, we believe that allowing some flexibility in the repayment of interest during the repayment schedule may further assist States with their budgetary concerns.

If a State chooses to repay the overpayment by installments, the State may choose the option of:

(1) Dividing the new overpayment amount (principal plus initial interest) by the 12-quarters of repayment. The initial interest is interest from the date of the disallowance notice until the first payment. The State will still be required to pay interest per quarter on the remaining balance of the overpayment until the final payment. To clarify how this option would work, we provide an example in Table 3; or

(2) Paying the first installment of the principal plus all interest accrued from the date of the disallowance notice through the first payment. The first installment would include the principal payment plus interest calculated from the date of the disallowance notice. Each subsequent payment would include the principal payment plus interest calculated on the remaining balance of the overpayment amount.

Under section 1903(d)(5) of the Act, a State that wishes to retain the Federal share of a disallowed amount will be charged interest, based on the average of the bond equivalent of the weekly 90-day treasury bill auction rates, from the date of the disallowance to the date of a final determination.

A State that has given a timely written notice of its intent to repay by installments to CMS will accrue interest during the repayment schedule on a quarterly basis at the Treasury Current Value Fund Rate (CVFR), from:

(1) The date of the disallowance notice, if the State requests a repayment schedule during the 60-day review period and does not request reconsideration by CMS or appeal to the Board within the 60-day review period.

(2) The date of the final determination of the administrative reconsideration, if the State requests a repayment schedule during the 60-day review period following the CMS final determination and does not appeal to the Board.

(3) The date of the final determination by the Board, if the State requests a repayment schedule during the 60-day review period following the Board's final determination.

The initial installment will be due by the last day of the quarter in which the State requests the repayment schedule. If the request is made during the last 30 days of the quarter, the initial installment will be due by the last day of the following quarter. Subsequent repayment amounts plus interest will be due by the last day of each subsequent quarter.

The CVFR is based on the Treasury Tax and Loan (TT&L) rate and is published annually in the **Federal Register**, usually by October 31st (effective on the first day of the next calendar year), at the following Web site: *http://www.fms.treas.gov/cvfr/index.html*.

We are soliciting comments related to these approaches and the best application of interest when a State chooses repayment of FFP by installments. We are also interested in any suggestions on alternative approaches with respect to the repayment of interest during the repayment schedule.

C. Repayment of Federal Funds by Installments

Currently, § 430.48 provides that States with significant repayment obligations in proportion to the size of their Medicaid programs may repay that liability in installments. Current regulations provide a 12-quarter time period for repayment similar to the time period implemented by the Federal Claims Collection Act. The State must meet two basic conditions for a repayment of Federal funds by installment. The amount to be repaid must exceed 2.5 percent of the estimated or actual annual State share of the Medicaid program and the State must provide written notice of intent to repay by installments before the total repayment is due.

Currently, the number of quarters allowed for a repayment schedule is determined on the basis of the ratio of repayment amounts to the annual State share of Medicaid expenditures. The percentages of the annual State amounts used to determine the proposed amounts of quarterly installments are: 2½; percent for each of the first 4 quarters; 5 percent for each of the second 4 quarters; and 17½; percent for each of the last 4 quarters.

This proposed rule would amend § 430.48 to revise the repayment schedule, providing more options for States electing a repayment schedule for

the payment of Federal funds by installment. We are proposing three schedules including schedules that recognize the unique fiscal pressures of States that are experiencing economic distress, and to make technical corrections.

The rationale for the installment repayment schedule is to enable States to continue to operate their programs effectively while repaying the Federal share. HHS has determined that the current provision is not sufficiently flexible to meet that goal. Therefore, we are revising the general provision to provide States with additional options for repayment.

Current regulations provide an exception to the 12-quarter time period for repayment when amounts due exceed the State's share of annual expenditures for the program to which the disallowance applies. We are not proposing to amend this provision.

We are proposing to replace the existing repayment schedule and qualifying criteria for States with significant repayment obligations (repayment amounts of at least 2.5 percent of total annual Medicaid expenditures) with three new repayment options to assist States in repayment of Federal funds. Two of the options are available to States at the time that the disallowance is established, either at the issuance of a disallowance letter or issuance of the administrative appeal decision.

The first option is a new standard repayment schedule. Any State would have the option of electing this standard repayment schedule which would allow the State to repay on a quarterly basis over a 3-year period, subject to a minimum repayment amount of at least 0.25 percent of total annual State share of Medicaid expenditures.

The second new option would be available to States experiencing a period of economic distress as defined in this proposed regulation. This option would also allow States to return funds over a 3-year period; however, States would have smaller payments in the first 2 years when their fiscal circumstances are more difficult and larger payments in the final year to ensure payment in full.

The third option is available for States who experience a period of economic distress that occurs or continues during an existing repayment plan. This third option allows the State an additional period of time to repay owed amounts dependent upon the ongoing economic health of the State. We describe each new option in this section. Furthermore, to clarify how the various proposed revised standard and alternative repayment schedules would work, we provide an example in Table 1.

1. Standard Repayment Schedule

In § 430.48, we propose to replace the current 2.5 percent threshold for determining whether a State would qualify for a repayment schedule. Therefore, all States that meet the new proposed 0.25 percent threshold would be eligible to choose the new standard repayment schedule (option 1). We propose a quarterly repayment schedule in which the State would repay the total overpayment amount in no more than a 12-quarter period (3 years). The amounts of the quarterly installments and the total quarters of the repayment schedule will be determined by dividing the total overpayment amount by a minimum proposed amount of quarterly installments. In this repayment schedule, the State must pay at least a minimum repayment amount per quarter of 0.25 percent of the annual State share (plus any calculated interest). The State would be required to repay not less than this amount each quarter for up to a 12-quarter period. The total repayment amount must be fully repaid within the 12-quarter period. In many instances, due to the minimum quarterly payment requirement, the repayment amount will be paid in full in less than 12 quarters.

Except in times when economic distress occurs during an existing repayment plan (option 3), as described below, the standard repayment period may not exceed 12 quarters unless the total repayment amount exceeds 100 percent of the State's estimated State share of annual expenditures.

Current regulations require that the remaining amount of the repayment be in quarterly amounts equal to not less than 17.5 percent of the estimated State share of annual expenditures. If the total repayment amount exceeds 100 percent of the State's estimated State share of annual expenditures, we are proposing a change that would allow the remaining amount of the repayment to be in quarterly amounts equal to not less than 8⅓ percent of the overpayment amount. This change would allow for repayment of the total amount that exceeds 100 percent of the State's estimated State share of annual expenditures to be repaid in 12 quarters.

The proposed 12-quarter time period for repayment is similar to the time period implemented in the Federal Claims Collection Act (Pub. L. 89–508), which generally limits the repayment of a debt due the Federal Government to 3 years. The Department's implementing regulations at 45 CFR 30.17, provide that the size and frequency of the payments should reasonably relate to the size of the debt and the debtor's ability to pay. Additionally, the installment agreement will provide for full payment of the debt, including interest and charges, in 3 years or less, when feasible. We believe that the proposed 12-quarter standard timeframe for repayment aligns with the intent of the Federal Claims Collection Act and implementing regulations. We are interested in comments related to the use of a minimum quarterly repayment amount allowing up to a 12-quarter repayment timeline.

We have also proposed to eliminate the requirement for offsetting of retroactive claims. This provision would undermine the purpose of the revised repayment schedule. Offsetting currently requires that prior period increasing adjustments claimed by States that are over 1-year old would be applied against the repayment amount. This would have the effect of altering (shortening) the repayment schedule by the amount of prior period claims for unrelated expenditures.

We are soliciting comments on the modifications to the standardized repayment schedule. We are particularly interested in receiving comments on our use of 0.25 percent of the State share as a minimum required repayment amount.

2. Alternate Repayment Schedule During Periods of Economic Distress

States owing the Federal Government significant amounts of Federal funds during a period of State economic downturn have requested recognition of the realities of their fiscal constraints through more flexibility in repayment by installment plan. We share the concern of States with respect to repayment of Federal funds during periods of State economic distress. We realize that immediate repayment of the entire amount or even repayment by installments under the new proposed regulations in certain instances could result in hardship for the health programs being administered by the State and have an adverse effect on the beneficiaries of these programs. Therefore, we are proposing an option (option 2) for States that have been experiencing economic distress. This option is an alternate to the standard repayment schedule for States experiencing economic distress at the time that a repayment schedule is initially developed. We are seeking comments not only on the creation of an alternate repayment schedule but also on all elements of the alternate schedule.

We are proposing at § 430.48(d) that if a State has been experiencing periods of economic distress, defined as a negative percentage change in the State's coincident index as determined by the Philadelphia Federal Reserve Bank, within the 6 months immediately prior to the start of a repayment schedule, the State may elect this alternate repayment schedule instead of the proposed standard repayment schedule. It still provides States up to 12 quarters to repay the full amount, but allows for lower payments in the earlier quarters to provide relief to States beginning to repay Federal funds in a time of economic hardship for the State. The entire overpayment amount will be repaid at the end of the 12-quarter period unless the State qualifies for an extension as discussed in option 3.

In § 430.48(c)(3),we propose that quarterly required repayment amounts will depend upon the total amount owed. If the total amount owed divided by 12 is less than 0.25 percent of the State share, the State would make 12 equal quarterly payments of the lesser amount. If the amount divided by 12 is greater than 0.25 percent of the State share, the quarterly repayment amount for the first 8 quarters will not be more than 0.25 percent of the estimated annual State share plus interest. The remaining balance of the overpayment amount would be divided equally over the remaining 4 quarters. This 12-quarter time period for repayment during periods of State economic distress was used because it is in accordance with the time period implemented by the Federal Claims Collection Act. The Federal Claims Collection Act generally limits the repayment of a debt due the Federal Government to 3 years.

3. Extended Repayment Schedule During Periods of Economic Distress

Additionally, we are proposing at § 430.48(e), an option (option 3) to extend a repayment schedule if a State has entered into a standard repayment schedule or the alternative schedule described above and enters into or continues to experience a period of economic distress. The State may only request to enter into the economic distress extension plan once per repayment; a State may not repeatedly request to begin new repayment periods based on the status of its economic health. This extension would create a new repayment period, beginning the quarter directly following a State's request (for example, 9th quarter), for the outstanding balance of the repayment amount calculated for the remaining quarters and any additional extension quarters.

We are proposing that a State which is already repaying amounts using the standard repayment schedule may request a new 3-year extension period for economic distress. A State that is currently repaying funds under a standard repayment schedule may request an economic distress extension if at any time during the repayment period, the State experiences 6 consecutive months of economic distress.

We are proposing to define ''economic distress'' as a negative percentage change in the State's coincident index as determined by the Philadelphia Federal Reserve Bank. As we discuss below, this index is based on four different State-level indicators that together reflect each State's overall economic health.

The consecutive period that forms the basis for such a request can include months immediately prior to the start of the standard repayment schedule as long as they create a consecutive 6-month period reaching into the repayment period. For example, when determining the initial repayment schedule, a State cannot qualify for the alternative payment schedule (option 2) because it has only experienced 4 consecutive months of economic distress. If the State continues to experience economic distress during the first 2 months of its standard repayment plan, it may request an economic distress extension because it has experienced 6 consecutive months of economic distress, 4 months prior to the repayment schedule and 2 months during the first months of the repayment schedule.

For States in a standard repayment schedule that qualify for the economic distress extension, the outstanding balance, including interest, will be used to recalculate a new 12-quarter repayment schedule using the same methodology as in option 2, the alternate repayment schedule; the remaining balance, including interest will be divided by 12. The first 8 quarterly payments will be the lesser of the quotient or 0.25 percent of the estimated annual State share. As in option 2, the remainder owed will be divided over the final 4 quarters of the extension period. Interest will continue to accrue during the new 12-quarters repayment schedule at the CVFR.

For States initially beginning repayment through an alternate repayment schedule, we propose to allow an extension of the repayment period to provide additional time to repay the overpayment amount if the State continues to find itself in economic distress during the original repayment period. If a State initially has an alternate repayment schedule in place (because it was in economic distress before the repayment schedule began) and has any qualifying periods of economic distress during the first 8 quarters of the alternate repayment schedule, the State may request that we extend the alternate repayment period by the number of such qualifying quarters. For purposes of this additional relief, qualifying periods of economic distress would include those quarters in which the State experienced at least 1 month of economic distress. In other words, for at least 1 month in that quarter, the State experienced economic distress as defined below.

This extension, beyond the original 12 quarters, would extend the number of quarters of qualifying periods of economic distress by the number of quarters in which the State experiences economic distress. We are proposing that the extension would allow a State to recalculate their payment amounts before the increased (ballooned payments) became due and would allow for no more than 8 additional quarters. For example, a State experiencing economic distress for 3 quarters of the first 8 quarters would receive an extension of 3 additional quarters for a total of 15 quarters to fully repay funds owed.

Continuing the example above, the State qualifying for 15 quarters would pay 0.25 percent of the State share for the first 8 quarters. For the remaining 7 quarters, the State would pay the balance of the repayment amount divided by 7 (the number of remaining quarters).

In Table 2, we provide an example to demonstrate and compare a State that repays using the current repayment schedule, the proposed standard repayment schedule, the proposed alternate repayment schedule begun during a period of economic distress, the proposed standard repayment schedule with an economic distress extension, and the proposed alternate repayment schedule initiated in a period of economic distress and extended for continued economic distress. For simplicity and clarity, Table 2 does not include interest that would be charged during the repayment process, but we have provided Table 3 to illustrate the application of interest charges.

TABLE 1—EXAMPLE

Total FY Medicaid State Share	$3,500,000,000
Overpayment Amount	220,200,000
Current Minimum Payment—2.5% of State Share	87,500,000
Proposed Standard Minimum Payment: Higher of:	
0.25% of State Share OR	8,750,000
Disallowed amount (D/A)/12 qtrs	18,350,000
Alternate Economic Distress:	
0.25% of State Share—8 qtrs	8,750,000
D/A balance/4 qtrs	37,550,000
D/A balance/7 qtrs	21,457,143

TABLE 2—EXAMPLE

Quarters	Current repayment schedule	Proposed standard payment schedule	Proposed alternate repayment schedule (State begins in economic distress amount) (no continuing distress)	Proposed alternate repayment schedule (State begins in economic distress) requests and qualifies for economic distress extension for Qtrs 1, 2, and 6)	Proposed alternate repayment schedule (State begins with standard repayment schedule, requests and qualifies for economic distress extension in Qtr. 4)
1	87,500,000	18,350,000	8,750,000	8,750,000	18,350,000
2	87,500,000	18,350,000	8,750,000	8,750,000	18,350,000
3	45,200,000	18,350,000	8,750,000	8,750,000	18,350,000
4		18,350,000	8,750,000	8,750,000	18,350,000
5		18,350,000	8,750,000	8,750,000	8,750,000
6		18,350,000	8,750,000	8,750,000	8,750,000
7		18,350,000	8,750,000	8,750,000	8,750,000
8		18,350,000	8,750,000	8,750,000	8,750,000
9		18,350,000	37,550,000	21,457,143	8,750,000
10		18,350,000	37,550,000	21,457,143	8,750,000
11		18,350,000	37,550,000	21,457,143	8,750,000
12		18,350,000	37,550,000	21,457,143	8,750,000
13				21,457,143	19,200,000
14				21,457,143	19,200,000
15				21,457,142	19,200,000
16					19,200,000
17					
18					
19					
20					
Total Repaid	220,200,000	220,200,000	220,200,000	220,200,000	220,200,000

TABLE 3—EXAMPLE

Principal Overpayment	220,000,000	
Interest	200,000	
Total Overpayment	220,200,000	
Current Value Fund Rate	3%	

Quarters	Proposed standard payment schedule principal	Proposed standard payment schedule interest	Proposed standard payment schedule total
1	18,350,000	1,628,877	19,978,877
2	18,350,000	1,481,088	19,831,088
3	18,350,000	1,348,113	19,698,113
4	18,350,000	1,198,682	19,548,682
5	18,350,000	1,026,191	19,376,191
6	18,350,000	889,932	19,239,932
7	18,350,000	750,389	19,100,389
8	18,350,000	600,958	18,950,958
9	18,350,000	441,603	18,791,603
10	18,350,000	298,776	18,648,776
11	18,350,000	152,665	18,502,665
12	18,350,000	3,234	18,353,234
13			
14			
15			
16			

Quarters	Proposed standard payment schedule principal	Proposed standard payment schedule interest	Proposed standard payment schedule total
17			
18			
19			
20			
Total Repaid	220,200,000	9,820,508	230,020,508

We are proposing that the determination of economic distress would be made on a State-specific basis as opposed to a national index. We believe this will ensure that States experiencing economic difficulty may avail themselves of this option regardless of whether the nation as a whole is facing a recession or time of growth. We believe that it is an equitable way of handling situations in which individual States are experiencing severe fiscal hardship.

We reviewed several different data sources to develop qualifying criteria for States seeking an alternate repayment schedule due to economic distress. We looked for indicators which were readily available to the States and CMS, transparent to the public, robust in its measurement of economic health, based on the most recent data possible, consistent across States, and predictably available on a regular basis in a timely manner. We also attempted to find a measure that mirrored as closely as possible the criteria used by the National Bureau of Economic Research (NBER) to determine a national recession.

We researched several potential economic distress measures and consulted various entities including the National Association of State Budget Officers, the Rockefeller Institute, the Philadelphia Federal Reserve Bank, and the Government Accountability Office (GAO). The main options we considered were a model used by the GAO, the Philadelphia Federal Reserve Bank State coincident index, and the measure of whether a State qualifies for extended benefits in the Unemployment Insurance program overseen by the U.S. Department of Labor. The GAO index is used to provide information to Congress on State level economic health. It provided much of what we believed would be necessary to accurately measure overall economic health. However, it is not publicly available nor is it replicated on a predictable basis. The Unemployment Insurance program provided data that was timely, accurate, and publicly available. However, it did not appear to be the most robust measure of total economic health in a State, nor did it closely reflect the type of information used by the NBER.

We are proposing to adopt the State coincident index as determined by the Philadelphia Federal Reserve Bank. Unlike the other indicators we reviewed, this measure met all of the criteria we established. It is publicly available on the Philadelphia Federal Reserve Web site (www.philadelphiafed.org), based on recent data, published in a timely manner, and published monthly. The index represents a robust measure of economic health. In addition, the Philadelphia Federal Reserve Bank State coincident index data compilation best approximated the type of information NBER reviews in determining a national recession. We are inviting comments on this choice of measures.

The coincident index combines four State-level indicators to summarize current economic conditions in a single statistic: nonfarm payroll employment; average hours worked in manufacturing; the unemployment rate; and wage and salary disbursements deflated by the consumer price index (U.S. city average). The trend for each State's index is set to the trend of its gross domestic product (GDP), so long-term growth in the State's index matches long-term growth in its GDP. The model and the input variables are consistent across the 50 States, so the State indexes are comparable to one another.

We are proposing that a State (including the District of Columbia and the territories) would be eligible to utilize the economic distress option for repayment if the State had a period of continuous distress as demonstrated by negative percent changes in the Philadelphia Federal Reserve Bank State coincident index for the immediate prior 6 months for which data is available. That is, if the State's index were negative for each of the 6 months preceding the beginning of the repayment period, then the State would be deemed to be experiencing a period of economic distress for purposes of the repayment schedule options and could request the alternative repayment schedule.

We performed an analysis to determine how frequently States would qualify for an alternate repayment schedule using the 6-month period as a trigger. Using data from NBER, we identified when the last 4 recession periods occurred and their duration. The most recent NBER declared national recession started in December of 2007 and continued through June 2009. The previous recession was from March 2001 through November 2001. Our objective was to compare the measures and to determine if any State would qualify for an alternate repayment schedule when the nation is not in a recession.

We then turned to data from the Philadelphia Federal Reserve Bank State coincident indexes to determine negative growth by State for the period of January 2005 through May 2010. We found that one State would have qualified for an alternate repayment schedule as early as October 2005 for a 2-month period (for example, for each of those 2 months, the immediate previous 6 months demonstrated economic distress). Additionally, we found other States that qualified as early as November 2007 and some that would qualify as late as April 2010. We only found one State that would not have met the requirements to qualify for the alternate repayment schedule.

We are particularly interested in receiving input on the Philadelphia Federal Reserve State coincident index as the criteria for State economic health. We are soliciting comments on our use of this index as well as suggestions for other potential measures of State economic health and/or distress. We welcome comments on the GAO model and the Unemployment Insurance determination as well as other potential indicators that are not specifically discussed.

We are also soliciting comments on whether the correct measure, if using the Philadelphia Federal Reserve Bank State coincident index, is a negative percent change for each of the previous 6 months in the immediate prior 6-month period. We considered using a 3-month look back period, as well as to look only at the current months within

a given quarter. We encourage comments on this as well as suggestions for alternate measures.

D. Refunding of Federal Share of Overpayments to Providers

We are proposing to revise § 433.300 through § 433.322 in accordance with section 6506 of the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010) (the Affordable Care Act). These provisions amended section 1903(d)(2) of the Act to provide an extension of the period for collection of provider overpayments. Under the new provisions, States have up to 1 year from the date of discovery of an overpayment made to a Medicaid provider to recover or to attempt to recover such an overpayment. At the end of the 1 year period, the State is required to return to the Federal Government the Federal share of any unrecovered amount.

In addition, for overpayments due to fraud, when a State is unable to recover the overpayment (or any portion thereof) within 1 year of discovery because no final determination of the amount of the overpayment has been made under an administrative or judicial process (as applicable), including as a result of a judgment being under appeal, the State will have until 30 days after the date on which a final judgment (including, if applicable, a final determination on an appeal) is made in the judicial or administrative process to recover such overpayment before being required to make the adjustment to the Federal share. Previously, States had up to 60 days to recover an overpayment and make an adjustment to the Federal share. There was also no specific statutory basis set forth in the Act for a State to recover or seek to recover an overpayment made to a Medicaid provider due to fraud. This rule replaces ''60-calendar day'' and ''60-day'' in § 433.316 with ''1-year'' to bring the regulatory language into alignment with the provisions of the Affordable Care Act.

We are also proposing to amend the Departmental regulations at § 433.304 by adding language that defines what constitutes ''final written notice''; when a Medicaid agency may treat an overpayment made to a Medicaid provider as resulting from fraud under § 433.316(d); and that the State is not required to return the Federal share of overpayments until 30 days after a final judgment (including a final determination on appeal) when a State has not recovered an overpayment resulting from fraud within 1-year of discovery. The proposed rule would also amend the regulations by deleting the definition of ''abuse'' from § 433.304 so that the regulatory language mirrors that of the statute as amended by the Affordable Care Act.

We are also proposing that interest will be due by the State on amounts of Medicaid provider overpayments that are not timely refunded by the State. A State that fails to timely refund such amounts improperly retains the use of such funds and will be presumed to have earned interest on that use. Such imputed interest will be deemed program income and must be refunded along with the principal amount. Interest will be assessed at the Current Value of Funds Rate (CVFR) and will accrue beginning on the day after the end of the 1-year period following discovery until the last day of the quarter for which the State submits a CMS–64 report refunding the Federal share of the overpayment.

These regulations do not apply to overpayments involving administrative costs. Therefore, the Federal share of all overpayments involving administrative costs must be refunded immediately following discovery, as required by section 1903(d)(2)(A) of the Act. An example of administrative costs would include any item claimed on the CMS–64.10 forms.

E. Technical Corrections to Medicaid Regulations

1. Grants Procedures

The proposed rule updates references at § 430.30 by striking ''CMS–25'' and adding ''CMS–37.'' The CMS–25 was renamed to the CMS–37, but the changes were never codified in regulation. We took the opportunity in this proposed rule to make the correction. States are currently using the CMS–37 form.

2. Deferral of Claims for FFP

The proposed rule would revise the delegation of authority for deferral determinations under § 430.40 to reflect internal agency organizational changes. Authority to impose deferral of claims for FFP has been revised from the Regional Administrator to the Consortium Administrator responsible for the Medicaid program.

3. Inpatient Services: Application of Upper Payment Limits (UPLs)

The rule proposes technical changes that remove UPL transition period language at § 447.272 and § 447.321. The last transition period expired on September 30, 2008.

4. Reporting Requirements for Disproportionate Share Hospital Payments

The proposed rule would correct a technical error in the regulation text at § 447.299(c)(15). This paragraph provides a narrative description of how ''total uninsured IP/OP uncompensated care costs'' is to be calculated from component data elements. The first sentence unintentionally and incorrectly references costs associated with Medicaid eligible individuals in the description of uninsured uncompensated costs. This reference is incorrect and could not be interpreted reasonably to contribute to an accurate description of ''total uninsured IP/OP uncompensated care costs.'' Additionally, it erroneously contradicts section 1923(g) of the Act, § 447.299, 42 CFR part 455 subpart D, and longstanding CMS policy. The second sentence of § 447.299(c)(15) accurately identifies the component data elements and correctly describes the calculation of ''total uninsured IP/OP uncompensated care costs,'' which does not include Medicaid eligible individuals.

F. Conforming Changes to CHIP Regulations

The CHIP regulations at § 457.210 through § 457.212 and 457.218 mirror Medicaid regulations at 42 CFR parts 430 and 433 related to deferrals, disallowances, and repayment of Federal funds by installments. We are proposing to make conforming changes to both the Medicaid and CHIP programs by striking § 457.210 through § 457.212 and § 457.218 and incorporating the requirements of 42 CFR part 430. We are incorporating these through reference in § 457.628(a).

We are also incorporating the requirements of 42 CFR part 433 with respect to overpayments. Section 2105(c)(6)(B) of the Act incorporates the overpayment requirements of section 1903(d)(2) of the Act into CHIP. Therefore, we are also amending the CHIP regulations to reflect the overpayment requirements as revised by the Affordable Care Act. We are incorporating these through reference in § 457.628(a).

III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and

approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements:

A. ICRs Regarding Disallowance of Claims for FFP (§ 430.42)

Section 430.42 was revised in accordance with the Medicare Improvement for Patients and Providers Act of 2008 (MIPPA) to set forth new procedures to review administrative determinations to disallow claims for FFP. These new procedures provide for an informal agency reconsideration that must be submitted in writing to the Administrator within 60 day after receipt of a disallowance letter. The reconsideration request must specify the findings or issues with which the State disagrees and the reason for the disagreement. It also may include supporting documentary evidence that the State wishes the Administrator to consider.

The burden associated with this requirement is the time and effort necessary for the State Medicaid Agency to draft and submit the reconsideration letter and supporting documentation. Although this requirement is subject to the PRA, we believe that 5 CFR 1320.4(a)(2), exempts the reconsideration letter as a collection of information and the PRA. In this case, the information associated with the reconsideration would be collected subsequent to an administrative action, that is, a determination to disallow.

B. ICRs Regarding Refund of Federal Share of Medicaid Overpayments to Providers (§ 433.322)

Section 2105(c)(6)(B) of the Act incorporates the overpayment requirements of section 1903(d)(2) of the Act into CHIP. The overpayment regulations at § 433.322 require that the Medicaid Agency ''maintain a separate record of all overpayment activities for each provider in a manner that satisfies the retention and access requirements of 45 CFR 74.53.'' We are incorporating these through reference in § 457.628(a). Accordingly, it would require CHIP programs to comply with § 433.322. States are currently required to maintain these records under current regulations for Medicaid (and by implication CHIP).

The recordkeeping requirements set out under 45 CFR 92.42 (and § 433.322) are adopted from OMB Circular A–110.

C. ICRs Regarding Medicaid Program Budget Report (CMS–37)

The information collection requirements associated with CMS–37 are approved by OMB and have been assigned OMB control number 0938–0101. This proposed rule would not impose any new or revised reporting or recordkeeping requirements concerning CMS–37.

D. ICRs Regarding Quarterly Medicaid Statement of Expenditures for the Medical Assistance Program (CMS–64)

The information collection requirements associated with CMS–64 are approved by OMB and have been assigned OMB control number 0938–0067. This proposed rule would not impose any new or revised reporting or recordkeeping requirements concerning CMS–64.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget,

Attention: CMS Desk Officer, 2292–P
Fax: (202) 395–6974; or
E-mail: *OIRA_submission@omb.eop.gov.*

IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Regulatory Impact Statement

A. Statement of Need

This proposed rule: (1) Implements changes to section 1116 of the Act as set forth in section 204 of the Medicare Improvement for Patients and Providers Act of 2008 (Pub. L. 110–275, enacted on July 15, 2008) to provide a new reconsideration process for administrative determinations to disallow claims for Federal financial participation (FFP) under title XIX of the Act (Medicaid);

(2) Implements changes to section 1903(d) (2) of the Act as set forth in section 6506 of the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010) (the Affordable Care Act), to lengthen the time States have to credit the Federal Government for identified but uncollected Medicaid provider overpayments and provides that interest is due for amounts not timely credited within that time period;

(3) Implements changes as set forth in Section 2107(e)(2)(B) of the Act which makes section 1116 of the Act applicable to CHIP, to the same extent as it is applicable to Medicaid, with respect to administrative review, unless inconsistent with the CHIP statute.

(4) Implements changes as set forth by HHS to enable States to continue to operate their Medicaid programs effectively while repaying the Federal share of unallowable expenditures and to provide more flexibility for States to manage their budgets during periods of economic downturn.

(5) Implements changes as set forth by HHS to clarify that interest charges accrue during the new administrative reconsideration process as set forth in section 204 of the Medicare Improvement for Patients and Providers Act of 2008 (Pub. L. 110–275, enacted on July 15, 2008) if a State chooses to retain the funds during that period.

We conducted a review of existing regulations to correct a technical error in the regulation text at § 447.299(c)(15) which erroneously contradicts section 1923(g) of the Act, § 447.299, 42 CFR part 455 subpart D, and longstanding CMS policy; revise internal delegations of authority to reflect current CMS structure; remove obsolete language; and correct other technical errors in accordance with section 6 of Executive Order 13563 of January 18, 2011.

B. Overall Impact

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), Executive Order 13563 on Improving Regulation and Regulatory Review (February 2, 2011), section 1102(b) of the Social Security Act,

section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This rule does not reach the economic threshold and thus is not considered a major rule.

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most physician practices, hospitals and other providers are small entities, either by nonprofit status or by qualifying as small businesses under the Small Business Administration's size standards (revenues of less than $7.0 to $34.5 million in any 1 year). States and individuals are not included in the definition of a small entity. For details, see the Small Business Administration's Web site at *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.*

We are not preparing an analysis for the RFA because the Secretary has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because the Secretary has determined that this proposed rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2011, that threshold is approximately $136 million. This rule would have no consequential effect on State, local, or Tribal governments in the aggregate, or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this regulation does not impose any costs on State or local governments, the requirements of Executive Order 13132 are not applicable.

C. Anticipated Effects

1. Effects on State Medicaid Programs

The rule provides States with the option to use certain provisions as well as proposes new requirements or changes to existing interpretations of statutory or regulatory requirements. This rule has multiple purposes, one of which is to provide for a new reconsideration process for administrative determinations to disallow Federal financial participation (FFP). This provision offers States the option of requesting reconsideration of a disallowance to CMS instead of or before requesting reconsideration by the HHS Board, which could reduce legal cost, time, and resources, if a disallowance is reversed by CMS. This provision concerns agency administrative appeals procedures and any direct burden that is imposed on States would not reach the economic threshold. This provision would also not affect substantive rights to administrative determinations consistent with existing statutes and regulations.

Another provision of this rule extends the time period a State has to recover or seek to recover an overpayment made to a Medicaid provider before the State must refund the Federal share of the uncollected overpayment to CMS. This provision updates current regulations to reflect new statutory requirements without substantive changes and we anticipate very slight if any economic impact. The provision also provides that interest will be due from States on Medicaid provider overpayments that are not timely credited. States are already required to credit the Federal share of interest actually earned from overpayments collected from providers, but not refunded to the Federal government within the applicable regulatory timeframe. Although imputing interest on amounts not properly refunded to the Federal Government (whether or not interest was actually earned) may slightly increase the amount owed to the Federal Government, this provision will only affect States that do not refund the Federal share of uncollected provider overpayments to the Federal government within statutory and regulatory timeframes. States may avoid interest liability by returning the Federal share of overpayments within the required timeframe. We believe this change will eliminate an incentive for States to delay timely crediting the Federal government with amounts due.

A third provision of this rule is to revise Medicaid and CHIP regulations related to the disallowance process to allow States the option to retain disputed Federal funds through the administrative review process. We cannot anticipate if States will choose to retain Federal funds through the administrative review process. If States decide to retain Federal funds, they may return the funds before the reconsideration or appeals process is completed without withdrawing the reconsideration or the appeal.

A fourth provision of this rule is to provide that interest charges accrue for any amounts the State opts to retain during these processes. This provision is intended to implement regulations that impose an interest charge on disallowed funds that a State retains pending completion of the administrative reconsideration and/or appeals process. Under section 1903(d)(5) of the Act, a State that wishes to retain the Federal share of a disallowed amount will be liable for interest on the retained funds, based on the average of the bond equivalent of the weekly 90-day treasury bill auction rates, from the date of the disallowance to the date of a final determination. We will assess interest on the funds from the date of the disallowance notice through the date we receive written notice from the State that it no longer wishes to retain the funds or a final determination has been reached through the appeals process.

Although the application of interest through the final determination may slightly increase the amount owed to the Federal Government due to the additional interest charges, this provision does not implement a new requirement or burden to the State. It instead provides States with the opportunity to keep the Federal funds in question during the entire

determination period. However, if the Federal funds are found to be due back to the Federal Government in the final determination, then the State is required to repay the accrued interest in addition to the disallowed amount. States may opt to pay the disallowed amounts at the time of the original disallowance in order to avoid interest charges.

We have also clarified current CMS policy in this rule that a State that has given a timely written notice of its intent to repay by installments to CMS will accrue interest during the repayment schedule on a quarterly basis at the Treasury Current Value Fund Rate (CVFR), from:

(1) The date of the disallowance notice, if the State requests a repayment schedule during the 60-day review period and does not request reconsideration by CMS or appeal to the Board within the 60-day review period.

(2) The date of the final determination of the administrative reconsideration, if the State requests a repayment schedule during the 60-day review period following the CMS final determination and does not appeal to the Board.

(3) The date of the final determination by the Board, if the State requests a repayment schedule during the 60-day review period following the Board's final determination.

A fifth provision of this rule is to revise installment repayment standards and schedules. This provision will provide States with more flexibility in repaying large amounts of Federal funds. We anticipate that the revised repayment schedule will ease the burden for States in periods of economic downturn and allow them to operate their program more effectively. States may choose repayment by installments in lieu of returning a large sum of FFP in a short period of time. States could potentially qualify for an alternate repayment schedule if they meet the regulatory requirements. We will charge interest on the funds from the date of the disallowance notice through the date we receive final payment of the repayment schedule. Although this may marginally increase the amount owed to the Federal Government due to the additional interest charges, the extended repayment schedule is purely an option for States, rather than a new requirement. This provision provides States the ability to analyze what method and timeline of repayment would work best for the State given the circumstances within the State at the time.

The remaining provisions of this rule make technical corrections, revise internal delegations of authority for administrative determinations, and remove obsolete language. These provisions merely update the regulations that are currently in effect without substantive changes.

D. Alternatives Considered

This section provides an overview of regulatory alternatives that we considered for this proposed rule. In determining the appropriate guidance to assist States in their efforts to meet Federal requirements, we conducted analysis and research in both the public and private sector. Based, in part, on this analysis and research we arrived at the provisions proposed in this rule.

1. Administrative Review of Determinations To Disallow Claims for FFP

In this section of the proposed rule, we are setting out procedures for States to request a reconsideration of a disallowance to the CMS Administrator. The proposed process is to be a quick and efficient process for States to point out clear errors or omissions in disallowance determinations, relating either to facts or policy interpretations, that can be corrected before the parties incur further time and expense in an appeal to the Board. Disputes that involve complex fact-finding or issues of legal authority are not appropriate for this expedited review process.

We considered the use of a conference, which would occur once the Administrator had reviewed the reconsideration documents. Either the Administrator or the State would have been able to request to schedule an informal conference. The purpose of the conference would have been to give the State an opportunity to make an oral presentation and give both parties an opportunity to clarify issues and questions about matters which may have been in question. We rejected this process because we do not believe such an option would achieve the objective to have a quick and efficient process relating either to facts or policy interpretations. Such a process could cause delays in resolving the disallowed funds sufficient to create additional burden to State budgets in the form of interest on disallowed amounts, legal fees, and utilization of resources, time and effort. There would also be an additional burden to States on the record retention requirements.

2. Repayment of Federal Funds by Installments

In this section of the proposed rule, we are proposing three schedules including schedules that recognize the unique fiscal pressures of States that are experiencing economic distress. We considered eliminating the threshold, which is based on a percentage of the estimated annual State's share of Medicaid expenditures, to qualify for a repayment schedule and establishing a repayment schedule based on dividing the overpayment amount by a standard 12-quarter schedule. We rejected this option because we wanted to ensure that States that request a repayment schedule would have a substantial amount in overpayments to repay and were not merely making token payments.

We also considered keeping the current percentage of 2.5 percent as the threshold, but due to the current economic downturn and the current strain on States' budgets, we decided to provide some relief and flexibility to States in the form of reducing the required amount of the estimated annual State's share of Medicaid expenditures to qualify for a repayment schedule.

In developing the alternate repayment schedules, we considered several different data sources to develop qualifying criteria for States seeking an alternate repayment schedule due to economic distress. We looked for indicators which were readily available to the States and CMS, transparent to the public, robust in its measurement of economic health, based on the most recent data possible, consistent across States, and predictably available on a regular basis in a timely manner. We also attempted to find a measure that mirrored as closely as possible the criteria used by the National Bureau of Economic Research (NBER) to determine a national recession.

We researched several potential economic distress measures and consulted various entities including the National Association of State Budget Officers, the Rockefeller Institute, the Philadelphia Federal Reserve Bank, and the Government Accountability Office (GAO). The main options we considered were a model used by the GAO, the Philadelphia Federal Reserve Bank State coincident index, and the measure of whether a State qualifies for extended benefits in the Unemployment Insurance program overseen by the U. S. Department of Labor. The GAO index is used to provide information to Congress on State level economic health. It provided much of what we believed would be necessary to accurately measure overall economic health. However, it is not publicly available nor is it replicated on a predictable basis. The Unemployment Insurance program provided data that was timely, accurate, and publicly available. However, it did not appear to be the most robust

measure of total economic health in a State, nor did it closely reflect the type of information used by the NBER.

E. Conclusion

For the reasons discussed above, we are not preparing analysis for either the RFA or section 1102(b) of the Act because we have determined that this regulation will not have a direct significant economic impact on a substantial number of small entities or a direct significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 430

Administrative practice and procedure, Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 433

Administrative practice and procedure, Child support, Claims, Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 447

Accounting, Administrative practice and procedure, Drugs, Grant programs—health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements, Rural areas.

42 CFR Part 457

Administrative practice and procedure, Grant programs—health, Health insurance, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR Chapter IV, as set forth below:

PART 430—GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

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

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

Subpart C—Grants; Reviews and Audits; Withholding for Failure To Comply; Deferral and Disallowance of Claims; Reduction of Federal Medicaid Payments

2. Section 430.30 is amended by revising paragraph (b) to read as follows:

§ 430.30 Grants procedures.

* * * * *

(b) *Quarterly estimates.* The Medicaid agency must submit Form CMS–37 (Medicaid Program Budget Report; Quarterly Distribution of Funding Requirements) to the central office (with a copy to the regional office) 45 days before the beginning of each quarter.

* * * * *

3. Section 430.33 is amended by revising paragraph (c)(2) to read as follows:

§ 430.33 Audits.

* * * * *

(c) * * *

(2) *Appeal.* Any exceptions that are not disposed of under paragraph (c)(1) of this section are included in a disallowance letter that constitutes the Department's final decision unless the State requests reconsideration by the Administrator or the Appeals Board. (Specific rules are set forth in § 430.42.)

* * * * *

4. Section 430.40 is amended by revising paragraphs (a)(1), (b)(1) introductory text, (c)(3), (c)(5), (c)(6), and (e)(1) to read as follows:

§ 430.40 Deferral of claims for FFP.

(a) * * *

(1) The Consortium Administrator for Medicaid or the Administrator questions its allowability and needs additional information in order to resolve the question; and

* * * * *

(b) * * *

(1) Within 15 days of the action described in paragraph (a)(2) of this section, the Consortium Administrator sends the State a written notice of deferral that—

* * * * *

(c) * * *

(3) If the Consortium Administrator finds that the materials are not in readily reviewable form or that additional information is needed, he or she promptly notifies the State that it has 15 days to submit the readily reviewable or additional materials.

* * * * *

(5) The Consortium Administrator has 90 days, after all documentation is available in readily reviewable form, to determine the allowability of the claim.

(6) If the Consortium Administrator cannot complete review of the material within 90 days, CMS pays the claim, subject to a later determination of allowability.

* * * * *

(e) * * *

(1) The Consortium Administrator or the Administrator gives the State written notice of his or her decision to pay or disallow a deferred claim.

* * * * *

5. Section 430.42 is amended by—

A. Revising paragraphs (a) introductory text and paragraph (a)(9).

B. Redesignating paragraphs (b), (c), and (d), as paragraphs (f), (g), and (h) respectively.

C. Adding new paragraphs (b), (c), (d), and (e).

D. Revising the paragraph heading of newly designated paragraph (f).

E. Revising newly designated paragraph (f)(2).

F. Adding new paragraph (f)(3).

G. Revising newly designated paragraphs (g) and (h).

The revisions and additions read as follows:

§ 430.42 Disallowance of claims for FFP.

(a) *Notice of disallowance and of right to reconsideration.* When the Consortium Administrator or the Administrator determines that a claim or portion of claim is not allowable, he or she promptly sends the State a disallowance letter that includes the following, as appropriate:

* * * * *

(9) A statement indicating that the disallowance letter is the Department's final decision unless the State requests reconsideration under paragraph (b)(2) or (f)(2) of this section.

(b) *Reconsideration of disallowances determination.* (1) The Administrator will reconsider Medicaid disallowance determinations.

(2) To request reconsideration of a disallowance, a State must complete the following:

(i) Submit the following within 60 days after receipt of the disallowance letter:

(A) A written request to the Administrator that includes the following:

(*1*) A copy of the disallowance letter.

(*2*) A statement of the amount in dispute.

(*3*) A brief statement of why the disallowance should be reversed or revised, including any information to support the State's position with respect to each issue.

(*4*) Additional information regarding factual matters or policy considerations.

(B) A copy of the written request to the Consortium Administrator.

(C) Send all requests for reconsideration via registered or certified mail to establish the date the reconsideration was received by CMS.

(ii) In all cases, the State has the burden of documenting the allowability of its claims for FFP.

(iii) Additional information regarding the legal authority for the disallowance will not be reviewed in the reconsideration but may be presented in any appeal to the Departmental Appeals Board under paragraph (f)(2) of this section.

(3) A State may request to retain the FFP during the reconsideration of the disallowance under section 1116(e) of the Act, in accordance with § 433.38 of this subchapter.

(4) The State is not required to request reconsideration before seeking review from the Departmental Appeals Board.

(5) The State may also seek reconsideration, and following the reconsideration decision, request a review from the Board.

(6) If the State elects reconsideration, the reconsideration process must be completed or withdrawn before requesting review by the Board.

(c) *Procedures for reconsideration of a disallowance.* (1) Within 60 days after receipt of the disallowance letter, the State shall, in accordance with (b)(2) of this section, submit in writing to the Administrator any relevant evidence, documentation, or explanation and shall simultaneously submit a copy thereof to the appropriate Consortium Administrator.

(2) After consideration of the policies and factual matters pertinent to the issues in question, the Administrator shall, within 60 days from the date of receipt of the request for reconsideration, issue a written decision or a request for additional information as described in the following subparagraph.

(3) At the Administrator's option, CMS may request from the State any additional information or documents necessary to make a decision. The request for additional information must be sent via registered or certified mail to establish the date the request was sent by CMS and received by the State.

(4) Within 30 days after receipt of the request for additional information, the State must submit to the Administrator, with a copy to the Consortium Administrator in readily reviewable form, all requested documents and materials.

(i) If the Administrator finds that the materials are not in readily reviewable form or that additional information is needed, he or she shall notify the State via registered or certified mail that it has 15 business days from the date of receipt of the notice to submit the readily reviewable or additional materials.

(ii) If the State does not provide the necessary materials within 15 business days from the date of receipt of such notice, the Administrator shall affirm the disallowance in a final reconsideration decision issued within 15 days from the due date of additional information from the State.

(5) If additional documentation is provided in readily reviewable form under the paragraph (c)(4) of this section, the Administrator shall issue a written decision, within 60 days from the due date of such information.

(6) The final written decision shall constitute final CMS administrative action on the reconsideration and shall be (within 15 business days of the decision) mailed to the State agency via registered or certified mail to establish the date the reconsideration decision was received by the State.

(7) If the Administrator does not issue a decision within 60 days from the date of receipt of the request for reconsideration or the date of receipt of the requested additional information, the disallowance shall be deemed to be affirmed upon reconsideration.

(8) No section of this regulation shall be interpreted as waiving the Department's right to assert any provision or exemption under the Freedom of Information Act.

(d) *Withdrawal of a request for reconsideration of a disallowance.* (1) A State may withdraw the request for reconsideration at any time before the notice of the reconsideration decision is received by the State without affecting its right to submit a notice of appeal to the Board. The request for withdrawal must be in writing and sent to the Administrator, with a copy to the Consortium Administrator, via registered or certified mail.

(2) Within 60 days after CMS' receipt of a State's withdrawal request, a State may, in accordance with (f)(2) of this section, submit a notice of appeal to the Board.

(e) *Implementation of decisions for reconsideration of a disallowance.* (1) After undertaking a reconsideration, the Administrator may affirm, reverse, or revise the disallowance and shall issue a final written reconsideration decision to the State in accordance with paragraph (c)(4) of this section.

(2) If the reconsideration decision requires an adjustment of FFP, either upward or downward, a subsequent grant award will be issued in the amount of such increase or decrease.

(3) Within 60 days after the receipt of a reconsideration decision from CMS a State may, in accordance with paragraph (f)(2) of this section, submit a notice of appeal to the Board.

(f) *Appeal of Disallowance.* * * * * * * * * *

(2) A State that wishes to request an appeal of a disallowance by the Board must:

(i) Submit a notice of appeal to the Board at the address given on the Departmental Appeals Board's Web site within 60 days after receipt of the disallowance letter.

(A) If a reconsideration of a disallowance was requested, within 60 days after receipt of the reconsideration decision; or

(B) If reconsideration of a disallowance was requested and no written decision was issued, within 60 days from the date the decision on reconsideration of the disallowance was due to be issued by CMS.

(ii) Include all of the following:

(A) A copy of the disallowance letter.

(B) A statement of the amount in dispute.

(C) A brief statement of why the disallowance is wrong.

(3) The Board's decision of an appeal under paragraph (f)(2) of this section shall be the final decision of the Secretary and shall be subject to reconsideration by the Board only upon a motion by either party that alleges a clear error of fact or law and is filed during the 60-day period that begins on the date of the Board's decision or to judicial review in accordance with paragraph (f)(2)(i) of this section.

(g) *Appeals procedures.* The reconsideration procedures are those set forth in 45 CFR part 16 for Medicaid and for many other programs administered by the Department.

(1) In all cases, the State has the burden of documenting the allowability of its claims for FFP.

(2) The Board shall conduct a thorough review of the issues, taking into account all relevant evidence, including such documentation as the State may submit and the Board may require.

(h) *Implementation of decisions.* (1) The Board may affirm the disallowance, reverse the disallowance, modify the disallowance, or remand the disallowance to CMS for further consideration.

(2) The Board will issue a final written decision to the State consistent with 45 CFR Part 16.

(3) If the appeal decision requires an adjustment of FFP, either upward or downward, a subsequent grant award will be issued in the amount of increase or decrease.

6. Section 430.48 is revised to read as follows:

§ 430.48 Repayment of Federal funds by installments.

(a) *Basic conditions.* When Federal payments have been made for claims

that are later found to be unallowable, the State may repay the Federal funds by installments if all of the following conditions are met:

(1) The amount to be repaid exceeds 0.25 percent of the estimated or actual annual State share for the Medicaid program.

(2) The State has given the Consortium Administrator written notice, before total repayment was due, of its intent to repay by installments.

(b) *Annual State share determination.* CMS determines whether the amount to be repaid exceeds 0.25 percent of the annual State share as follows:

(1) If the Medicaid program is ongoing, CMS uses the annual estimated State share of Medicaid expenditures for the current year, as shown on the State's latest Medicaid Program Budget Report (CMS–37). The current year is the year in which the State requests the repayment by installments.

(2) If the Medicaid program has been terminated by Federal law or by the State, CMS uses the actual State share that is shown on the State's CMS–64 Quarterly Expense Report for the last four quarters filed.

(c) *Standard Repayment amounts, schedules, and procedures.* (1) *Repayment amount.* The repayment amount may not include any amount previously approved for installment repayment.

(2) *Repayment schedule.* The maximum number of quarters allowed for the standard repayment schedule is 12 quarters (3 years), except as provided in paragraphs (c)(4) and (e) of this section.

(3) *Quarterly repayment amounts.* (i) The quarterly repayment amounts for each of the quarters in the repayment schedule will be the larger of the repayment amount divided by 12 quarters or the minimum repayment amount;

(ii) The minimum quarterly repayment amounts for each of the quarters in the repayment schedule is 0.25 percent of the estimated State share of the current annual expenditures for Medicaid;

(iii) The repayment period may be less than 12 quarters when the minimum repayment amount is required.

(4) *Extended schedule.* (i) The repayment schedule may be extended beyond 12 quarterly installments if the total repayment amount exceeds 100 percent of the estimated State share of the current annual expenditures;

(ii) The quarterly repayment amount will be 8⅓ percent of the estimated State share of the current annual expenditures until fully repaid.

(5) *Repayment process.* (i) Repayment is accomplished through deposits into the State's Payment Management System (PMS) account;

(ii) A State may choose to make payment by Automated Clearing House (ACH) direct deposit, by check, or by Fedwire transfer.

(6) *Reductions.* If the State chooses to repay amounts representing higher percentages during the early quarters, any corresponding reduction in required minimum percentages is applied first to the last scheduled payment, then to the next to the last payment, and so forth as necessary.

(d) *Alternate repayment amounts, schedules, and procedures for States experiencing economic distress immediately prior to the repayment period.* (1) *Repayment amount.* The repayment amount may not include amounts previously approved for installment repayment if a State initially qualifies for the alternate repayment schedule at the onset of an installment repayment period.

(2) *Qualifying period of economic distress.* (i) A State would qualify to avail itself of the alternate repayment schedule if it demonstrates the State is experiencing a period of economic distress;

(ii) A period of economic distress is one in which the State demonstrates distress for at least each of the previous 6 months, ending the month prior to the date of the State's written request for an alternate repayment schedule, as determined by a negative percent change in the monthly Philadelphia Federal Reserve Bank State coincident index.

(3) *Repayment schedule.* The maximum number of quarters allowed for the alternate repayment schedule is 12 quarters (3 years), except as provided in paragraph (d)(5) of this section.

(4) *Quarterly repayment amounts.* (i) The quarterly repayment amounts for each of the first 8 quarters in the repayment schedule will be the smaller of the repayment amount divided by 12 quarters or the maximum quarterly repayment amount;

(ii) The maximum quarterly repayment amounts for each of the first 8 quarters in the repayment schedule is 0.25 percent of the annual State share determination as defined in paragraph (b) of this section;

(iii) For the remaining 4 quarters, the quarterly repayment amount equals the remaining balance of the overpayment amount divided by the remaining 4 quarters.

(5) *Extended schedule.* (i) For a State that initiated its repayment under an alternate payment schedule for economic distress, the repayment schedule may be extended beyond 12 quarterly installments if the total repayment amount exceeds 100 percent of the estimated State share of current annual expenditures;

(A) In these circumstances, paragraph (d)(3) of this section is followed for repayment of the amount equal to 100 percent of the estimated State share of current annual expenditures.

(B) The remaining amount of the repayment is in quarterly amounts equal to 8⅓ percent of the estimated State share of current annual expenditures until fully repaid.

(ii) Upon request by the State, the repayment schedule may be extended beyond 12 quarterly installments if the State has qualifying periods of economic distress in accordance with paragraph (d)(2) of this section during the first 8 quarters of the alternate repayment schedule.

(A) To qualify for additional quarters, the States must demonstrate a period of economic distress in accordance with paragraph (d)(2) of this section for at least 1 month of a quarter during the first 8 quarters of the alternate repayment schedule.

(B) For each quarter (of the first 8 quarters of the alternate payment schedule) identified as qualified period of economic distress, one quarter will be added to the remaining 4 quarters of the original 12 quarter repayment period.

(C) The total number of quarters in the alternate repayment schedule shall not exceed 20 quarters.

(6) *Repayment process.* (i) Repayment is accomplished through deposits into the State's Payment Management System (PMS) account;

(ii) A State may choose to make payment by Automated Clearing House (ACH) direct deposit, by check, or by Fedwire transfer.

(7) If the State chooses to repay amounts representing higher percentages during the early quarters, any corresponding reduction in required minimum percentages is applied first to the last scheduled payment, then to the next to the last payment, and so forth as necessary.

(e) *Alternate repayment amounts, schedules, and procedures for States entering into distress during a standard repayment schedule.* (1) *Repayment amount.* The repayment amount may include amounts previously approved for installment repayment if a State enters into a qualifying period of economic distress during an installment repayment period.

(2) *Qualifying period of economic distress.* (i) A State would qualify to avail itself of the alternate repayment

schedule if it demonstrates the State is experiencing economic distress;

(ii) A period of economic distress is one in which the State demonstrates distress for each of the previous 6 months, that begins on the date of the State's request for an alternate repayment schedule, as determined by a negative percent change in the monthly Philadelphia Federal Reserve Bank State coincident index.

(3) *Repayment schedule.* The maximum number of quarters allowed for the alternate repayment schedule is 12 quarters (3 years), except as provided in paragraph (e)(5) of this section.

(4) *Quarterly repayment amounts.* (i) The quarterly repayment amounts for each of the first 8 quarters in the repayment schedule will be the smaller of the repayment amount divided by 12 quarters or the maximum repayment amount;

(ii) The maximum quarterly repayment amounts for each of the first 8 quarters in the repayment schedule is 0.25 percent of the annual State share determination as defined in paragraph (b) of this section;

(iii) For the remaining 4 quarters, the quarterly repayment amount equals the remaining balance of the overpayment amount divided by the remaining 4 quarters.

(5) *Extended schedule.* (i) For a State that initiated its repayment under the standard payment schedule and later experienced periods of economic distress and elected an alternate repayment schedule, the repayment schedule may be extended beyond 12 quarterly installments if the total repayment amount of the remaining balance of the standard schedule, exceeds 100 percent of the estimated State share of the current annual expenditures;

(ii) In these circumstances, paragraph (d)(3) of this section is followed for repayment of the amount equal to 100 percent of the estimated State share of current annual expenditures;

(iii) The remaining amount of the repayment is in quarterly amounts equal to 8⅓ percent of the estimated State share of the current annual expenditures until fully repaid.

(6) *Repayment process.* (i) Repayment is accomplished through deposits into the State's Payment Management System (PMS) account;

(ii) A State may choose to make payment by Automated Clearing House (ACH) direct deposit, by check, or by Fedwire transfer.

(7) If the State chooses to repay amounts representing higher percentages during the early quarters, any corresponding reduction in required minimum percentages is applied first to the last scheduled payment, then to the next to the last payment, and so forth as necessary.

PART 433—STATE FISCAL ADMINISTRATION

7. The authority citation for part 433 continues as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

Subpart A—Federal Matching and General Administration Provisions

8. Section 433.38 is amended by revising paragraphs (a) introductory text, (b)(1), (b)(3), (c), (e)(1)(i),(e)(1)(ii), (e)(1)(iii), (e)(1)(iv), and by adding paragraphs (e)(1)(v), and (e)(1)(vi) to read as follows:

§ 433.38 Interest charge on disallowed claims for FFP.

(a) *Basis and scope.* This section is based on section 1903(d)(5) of the Act, which requires that the Secretary charge a State interest on the Federal share of claims that have been disallowed but have been retained by the State during the administrative appeals process under section 1116(e) of the Act and the Secretary later recovers after the administrative appeals process has been completed. This section does not apply to—

* * * * *

(b) * * *

(1) CMS will charge the State interest on FFP when—

(i) CMS has notified the Medicaid agency under § 430.42 of this subpart that a State's claim for FFP is not allowable;

(ii) The agency has requested a reconsideration of the disallowance to the Administrator under § 430.42 of this chapter and has chosen to retain the FFP during the administrative reconsideration process in accordance with paragraph (c)(2) of this section;

(iii)(A) CMS has made a final determination upholding part or all of the disallowance;

(B) The agency has withdrawn its request for administrative reconsideration on all or part of the disallowance; or

(C) The agency has reversed its decision to retain the funds without withdrawing its request for administrative reconsideration and CMS upholds all or part of the disallowance.

(iv) The agency has appealed the disallowance to the Departmental Appeals Board under 45 CFR Part 16 and has chosen to retain the FFP during the administrative appeals process in accordance with paragraph (c)(2) of this section.

(v)(A)The Board has made a final determination upholding part or all of the disallowance;

(B) The agency has withdrawn its appeal on all or part of the disallowance; or

(C) The agency has reversed its decision to retain the funds without withdrawing its appeal and the Board upholds all or part of the disallowance.

* * * * *

(3) Unless an agency decides to withdraw its request for administrative reconsideration or appeal on part of the disallowance and therefore returns only that part of the funds on which it has withdrawn its request for administrative reconsideration or appeal, any decision to retain or return disallowed funds must apply to the entire amount in dispute.

* * * * *

(c) *State procedures.* (1) If the Medicaid agency has requested administrative reconsideration to CMS or appeal of a disallowance to the Board and wishes to retain the disallowed funds until CMS or the Board issues a final determination, the agency must notify the CMS Consortium Administrator in writing of its decision to do so.

(2) The agency must mail its notice to the CMS Consortium Administrator within 60 days of the date of receipt of the notice of the disallowance, as established by the certified mail receipt accompanying the notice.

(3) If the agency withdraws its decision to retain the FFP or its request for administrative reconsideration or appeal on all or part of the FFP, the agency must notify CMS in writing.

* * * * *

(e) * * *

(1) * * *

(i) On the date of the final determination by CMS of the administrative reconsideration if the State elects not to appeal to the Board, or final determination by the Board;

(ii) On the date CMS receives written notice from the State that it is withdrawing its request for administrative reconsideration and elects not to appeal to the Board, or withdraws its appeal to the Board on all of the disallowed funds; or

(iii) If the agency withdraws its administrative reconsideration on part of the funds on—

(A) The date CMS receives written notice from the agency that it is withdrawing its request for administrative reconsideration on a specified part of the disallowed funds

for the part on which the agency withdraws its request for administrative reconsideration; and

(B) The date of the final determination by CMS on the part for which the agency pursues its administrative reconsideration; or

(iv) If the agency withdraws its appeal on part of the funds, on—

(A) The date CMS receives written notice from the agency that it is withdrawing its appeal on a specified part of the disallowed funds for the part on which the agency withdraws its appeal; and

(B) The date of the final determination by the Board on the part for which the agency pursues its appeal; or

(v) If the agency has given CMS written notice of its intent to repay by installment, in the quarter in which the final installment is paid. Interest during the repayment of Federal funds by installments will be at the Current Value of Funds Rate (CVFR); or

(vi) The date CMS receives written notice from the agency that it no longer chooses to retain the funds.

* * * * *

Subpart F—Refunding of Federal Share of Medicaid Overpayments to Providers

9. Section 433.300 is amended by revising paragraph (b) to read as follows:

§ 433.300 Basis.

* * * * *

(b) Section 1903(d)(2)(C) and (D) of the Act, which provides that a State has 1 year from discovery of an overpayment for Medicaid services to recover or attempt to recover the overpayment from the provider before adjustment in the Federal Medicaid payment to the State is made; and that adjustment will be made at the end of the 1-year period, whether or not recovery is made, unless the State is unable to recover from a provider because the overpayment is a debt that has been discharged in bankruptcy or is otherwise uncollectable.

* * * * *

10. Section 433.302 is revised to read as follows:

§ 433.302 Scope of subpart.

This subpart sets forth the requirements and procedures under which States have 1 year following discovery of overpayments made to providers for Medicaid services to recover or attempt to recover that amount before the States must refund the Federal share of these overpayments to CMS, with certain exceptions.

11. Section 433.304 is amended by removing the definition of ''Abuse'' and adding the definition of ''Final written notice'' to read as follows:

§ 433.304 Definitions.

* * * * *

Final written notice means that written communication, immediately preceding the first level of formal administrative or judicial proceedings, from a Medicaid agency official or other State official that notifies the provider of the State's overpayment determination and allows the provider to contest that determination, or that notifies the State Medicaid agency of the filing of a civil or criminal action.

* * * * *

12. Section 433.312 is amended by revising paragraph (a) to read as follows:

§ 433.312 Basic requirements for refunds.

(a) *Basic rules.* (1) Except as provided in paragraph (b) of this section, the State Medicaid agency has 1 year from the date of discovery of an overpayment to a provider to recover or seek to recover the overpayment before the Federal share must be refunded to CMS.

(2) The State Medicaid agency must refund the Federal share of overpayments at the end of the 1-year period following discovery in accordance with the requirements of this subpart, whether or not the State has recovered the overpayment from the provider.

* * * * *

13. Section 433.316 is amended by revising paragraphs (a), (c) introductory text, (d), (f), and (g) to read as follows:

§ 433.316 When discovery of overpayment occurs and its significance.

(a) *General rule.* The date on which an overpayment is discovered is the beginning date of the 1-year period allowed for a State to recover or seek to recover an overpayment before a refund of the Federal share of an overpayment must be made to CMS.

* * * * *

(c) *Overpayments resulting from situations other than fraud.* An overpayment resulting from a situation other than fraud is discovered on the earliest of—

* * * * *

(d) *Overpayments resulting from fraud.* (1) An overpayment that results from fraud is discovered on the date of the final written notice (as defined in § 433.304 of this subchapter) of the State's overpayment determination.

(2) When the State is unable to recover a debt which represents an overpayment (or any portion thereof) resulting from fraud within 1 year of discovery because no final determination of the amount of the overpayment has been made under an administrative or judicial process (as applicable), including as a result of a judgment being under appeal, no adjustment shall be made in the Federal payment to such State on account of such overpayment (or any portion thereof) until 30 days after the date on which a final judgment (including, if applicable, a final determination on an appeal) is made.

(3) The Medicaid agency may treat an overpayment made to a Medicaid provider as resulting from fraud under subsection (d) of this section only if it has referred a provider's case to the Medicaid fraud control unit, or appropriate law enforcement agency in States with no certified Medicaid fraud control unit, as required by § 455.15, § 455.21, or § 455.23 of this chapter, and the Medicaid fraud control unit or appropriate law enforcement agency has provided the Medicaid agency with written notification of acceptance of the case; or if the Medicaid fraud control unit or appropriate law enforcement agency has filed a civil or criminal action against a provider and has notified the State Medicaid agency.

* * * * *

(f) *Effect of changes in overpayment amount.* Any adjustment in the amount of an overpayment during the 1-year period following discovery (made in accordance with the approved State plan, Federal law and regulations governing Medicaid, and the appeals resolution process specified in State administrative policies and procedures) has the following effect on the 1-year recovery period:

(1) A downward adjustment in the amount of an overpayment subject to recovery that occurs after discovery does not change the original 1-year recovery period for the outstanding balance.

(2) An upward adjustment in the amount of an overpayment subject to recovery that occurs during the 1-year period following discovery does not change the 1-year recovery period for the original overpayment amount. A new 1-year period begins for the incremental amount only, beginning with the date of the State's written notification to the provider regarding the upward adjustment.

(g) *Effect of partial collection by State.* A partial collection of an overpayment amount by the State from a provider during the 1-year period following discovery does not change the 1-year recovery period for the balance of the original overpayment amount due to CMS.

* * * * *

14. Section 433.318 is amended by revising paragraphs (a)(2), (b) introductory text, (c) introductory text, (c)(1), (d)(1), and (e), to read as follows:

§ 433.318 Overpayments involving providers who are bankrupt or out of business.

(a) * * *

(2) The agency must notify the provider that an overpayment exists in any case involving a bankrupt or out-of-business provider and, if the debt has not been determined uncollectable, take reasonable actions to recover the overpayment during the 1-year recovery period in accordance with policies prescribed by applicable State law and administrative procedures.

(b) *Overpayment debts that the State need not refund.* Overpayments are considered debts that the State is unable to recover within the 1-year period following discovery if the following criteria are met:

* * * * *

(c) *Bankruptcy.* The agency is not required to refund to CMS the Federal share of an overpayment at the end of the 1-year period following discovery, if—

(1) The provider has filed for bankruptcy in Federal court at the time of discovery of the overpayment or the provider files a bankruptcy petition in Federal court before the end of the 1-year period following discovery; and

* * * * *

(d) * * *

(1) The agency is not required to refund to CMS the Federal share of an overpayment at the end of the 1-year period following discovery if the provider is out of business on the date of discovery of the overpayment or if the provider goes out of business before the end of the 1-year period following discovery.

* * * * *

(e) *Circumstances requiring refunds.* If the 1-year recovery period has expired before an overpayment is found to be uncollectable under the provisions of this section, if the State recovers an overpayment amount under a court-approved discharge of bankruptcy, or if a bankruptcy petition is denied, the agency must refund the Federal share of the overpayment in accordance with the procedures specified in § 433.320 of this subpart.

15. Section 433.320 is amended by—

A. Revising paragraphs (a)(2), (b)(1), (d), (f)(2), (g)(1), and (h)(1).

B. Adding paragraph (a)(4).

The revisions and addition read as follows:

§ 433.320 Procedures for refunds to CMS.

(a) * * *

(2) The agency must credit CMS with the Federal share of overpayments subject to recovery on the earlier of—

(i) The Form CMS–64 submission due to CMS for the quarter in which the State recovers the overpayment from the provider; or

(ii) The Form CMS–64 due to CMS for the quarter in which the 1-year period following discovery, established in accordance with Sec. 433.316, ends.

* * * * *

(4) If the State does not refund the Federal share of such overpayment as indicated in paragraph (a)(2), the State will be liable for interest on the amount equal to the Federal share of the non-recovered, non-refunded overpayment amount. Interest during this period will be at the Current Value of Funds Rate (CVFR), and will accrue beginning on the day after the end of the 1-year period following discovery until the last day of the quarter for which the State submits a CMS–64 report refunding the Federal share of the overpayment.

(b) * * *

(1) The State is not required to refund the Federal share of an overpayment at the end of the 1-year period if the State has already reported a collection or submitted an expenditure claim reduced by a discrete amount to recover the overpayment prior to the end of the 1-year period following discovery.

* * * * *

(d) *Expiration of 1-year recovery period.* If an overpayment has not been determined uncollectable in accordance with the requirements of § 433.318 of this subpart at the end of the 1-year period following discovery of the overpayment, the agency must refund the Federal share of the overpayment to CMS in accordance with the procedures specified in paragraph (a) of this section.

* * * * *

(f) * * *

(2) The Form CMS–64 submission for the quarter in which the 1-year period following discovery of the overpayment ends.

(g) * * *

(1) If a provider is determined bankrupt or out of business under this section after the 1-year period following discovery of the overpayment ends and the State has not been able to make complete recovery, the agency may reclaim the amount of the Federal share of any unrecovered overpayment amount previously refunded to CMS. CMS allows the reclaim of a refund by the agency if the agency submits to CMS documentation that it has made reasonable efforts to obtain recovery.

* * * * *

(h) * * *

(1) Amounts of overpayments not collected during the quarter but refunded because of the expiration of the 1-year period following discovery;

* * * * *

16. Section 433.322 is revised to read as follows:

§ 433.322 Maintenance of Records.

The Medicaid agency must maintain a separate record of all overpayment activities for each provider in a manner that satisfies the retention and access requirements of 45 CFR 92.42.

PART 447—PAYMENTS FOR SERVICES

17. The authority citation for part 447 continues as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

Subpart C—Payment for Inpatient Hospital and Long-Term Care Facility Services

§ 447.272 [Amended]

18. Section 447.272 is amended by removing paragraphs (e) and (f).

Subpart E—Payment Adjustments for Hospitals That Serve a Disproportionate Number of Low-Income Patients

19. Section 447.299 is amended by revising paragraph (c)(15) to read as follows:

§ 447.299 Reporting requirements.

* * * * *

(c) * * *

(15) *Total uninsured IP/OP uncompensated care costs.* Total annual amount of uncompensated IP/OP care for furnishing inpatient hospital and outpatient hospital services to individuals with no source of third party coverage for the hospital services they receive.

(i) The amount should be the result of subtracting paragraphs (c)(12) and (c)(13), from paragraph (c)(14) of this section.

(ii) The uncompensated care costs of providing physician services to the uninsured cannot be included in this amount.

(iii) The uninsured uncompensated amount also cannot include amounts associated with unpaid co-pays or deductibles for individuals with third party coverage for the inpatient and/or outpatient hospital services they receive or any other unreimbursed costs

associated with inpatient and/or outpatient hospital services provided to individuals with those services in their third party coverage benefit package.

(iv) The uncompensated care costs do not include bad debt or payer discounts related to services furnished to individuals who have health insurance or other third party payer.

* * * * *

Subpart F—Payment Methods for Other Institutional and Non-Institutional Services

§ 447.321 [Amended]

20. Section 447.321 is amended by removing paragraphs (e) and (f).

PART 457—ALLOTMENTS AND GRANTS TO STATES

21. The authority citation for part 457 continues as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

Subpart B—General Administration—Reviews and Audits; Withholding for Failure To Comply; Deferral and Disallowance of Claims; Reduction of Federal Medical Payments

§ 457.210 [Removed]

22. Section 457.210 is removed.

§ 457.212 [Removed]

23. Section 457.212 is removed.

§ 457.218 [Removed]

24. Section 457.218 is removed.

Subpart F—Payments to States

25. Section 457.628 is amended by revising paragraph (a) to read as follows:

§ 457.628 Other applicable Federal regulations.

* * * * *

(a) HHS regulations in § 433.312 through § 433.322 of this chapter (related to Overpayments); § 433.38 of this chapter (Interest charge on disallowed claims of FFP); § 430.40 through § 430.42 of this chapter (Deferral of claims for FFP and Disallowance of claims for FFP); § 430.48 of this chapter (Repayment of Federal funds by installments); § 433.50 through § 433.74 of this chapter (sources of non-Federal share and Health Care-Related Taxes and Provider Related Donations); and § 447.207 of this chapter (Retention of Payments) apply to State's CHIP programs in the same manner as they apply to State's Medicaid programs.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: February 2, 2011.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: July 27, 2011.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2011–19528 Filed 8–2–11; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2011–0002; Internal Agency Docket No. FEMA–B–1207]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this proposed rule is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before November 1, 2011.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1207, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

State	City/town/county	Source of flooding	Location **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)	
				Existing	Modified
City of Cadiz, Kentucky					
Kentucky	City of Cadiz	Little River (backwater effects from Lake Barkley).	From the Lake Barkley confluence to approximately 4.5 miles upstream of the Lake Barkley confluence.	None	+375
Kentucky	City of Cadiz	Little River Tributary 1 (backwater effects from Lake Barkley).	From the Little River confluence to approximately 1,678 feet upstream of the Little River confluence.	None	+375

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Cadiz

Maps are available for inspection at 63 Main Street, Cadiz, KY 42211.

Unincorporated Areas of Caldwell Parish, Louisiana					
Louisiana	Unincorporated Areas of Caldwell Parish.	Hurricane Creek/Branch 2–3.	Approximately 0.9 mile upstream of the Hurricane Creek confluence.	None	+146
			Approximately 1.0 mile upstream of the Hurricane Creek confluence.	None	+146
Louisiana	Unincorporated Areas of Caldwell Parish.	Hurricane Creek/Branch 3–1.	Approximately 1,275 feet upstream of the Hurricane Creek confluence.	None	+168
			Approximately 1.0 mile upstream of the Hurricane Creek confluence.	None	+168
Louisiana	Unincorporated Areas of Caldwell Parish.	Hurricane Creek/Branch 3–4 (Hanchey Tributary).	Approximately 265 feet upstream of the Hurricane Creek confluence.	None	+156
			Approximately 0.87 mile upstream of the Hurricane Creek confluence.	None	+156

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Caldwell Parish

Maps are available for inspection at the Caldwell Parish Community Recreation Center, 911 Complex, 6563 U.S. Route 165, Columbia, LA 71418.

State	City/town/county	Source of flooding	Location **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)	
				Existing	Modified
Town of Stuckey, South Carolina					
South Carolina	Town of Stuckey ...	Indiantown Swamp	At the upstream side of Mount Carmel Road.	None	+31
			Approximately 0.56 mile upstream of Mount Carmel Road.	None	+32

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Town of Stuckey
Maps are available for inspection at the Town Office, 11 Town Hall Road, Stuckey, SC 29554.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet(NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Carroll County, New Hampshire (All Jurisdictions)				
Bay Tributary 1	At the Moultonborough Bay confluence	None	+506	Town of Moultonborough.
	Approximately 1.09 miles upstream of the Bay Tributary 1.1 divergence.	None	+547	
Bay Tributary 1.1	At the Moultonborough Bay confluence	None	+506	Town of Moultonborough.
	At the Bay Tributary 1 divergence	None	+515	
Bearcamp River	At the upstream side of Covered Bridge Road	+428	+429	Town of Ossipee.
	Approximately 520 feet upstream of Covered Bridge Road.	+430	+431	
Bearcamp River	Approximately 2.06 miles upstream of State Route 113 (Tamworth Road).	+567	+566	Town of Tamworth.
	Approximately 2.15 miles upstream of State Route 113 (Tamworth Road).	+571	+570	
Berry Pond/Berry Pond Tributary 1.	Approximately 150 feet upstream of State Route 25 (Whittier Highway).	None	+568	Town of Moultonborough, Town of Sandwich.
	Approximately 2.6 miles upstream of State Route 25 (Whittier Highway).	None	+622	
Berry Pond Diversion	At the Red Hill River confluence	None	+536	Town of Moultonborough.
	At the Berry Pond divergence	None	+569	
East Branch Saco River	Approximately 160 feet upstream of U.S. Route 302B (State Route 16A).	+565	+566	Town of Bartlett, Town of Jackson.
	Approximately 0.63 miles upstream of Town Hall Road.	+835	+836	
Halfway Brook	At the Moultonborough Bay confluence	None	+506	Town of Moultonborough.
	Approximately 1.29 miles upstream of Ossipee Mountain Road.	None	+1428	
Halfway Brook Tributary 1	At the Halfway Brook confluence	None	+529	Town of Moultonborough.
	Approximately 0.88 miles upstream of the Halfway Brook confluence.	None	+541	
Moultonborough Bay	Entire shoreline	None	+506	Town of Moultonborough.
Ossipee Lake	Entire shoreline	None	+414	Town of Effingham.
Pequawket Pond	Entire shoreline within community	None	+464	Town of Albany.
Province Lake	Entire shoreline	None	+480	Town of Effingham.
Red Hill River	At the Moultonborough Bay confluence	None	+506	Town of Moultonborough, Town of Sandwich.
	Approximately 1.70 miles upstream of School House Road.	None	+587	

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet(NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Red Hill River Tributary 1	At the Red Hill River confluence	None	+536	Town of Moultonborough.
	Approximately 0.80 miles upstream of Sheridan Road	None	+878	
Red Hill River	At the Red Hill River confluence	None	+536	Town of Moultonborough.
Tributary 1 Diversion	At the Red Hill River Tributary 1 divergence	None	+600	
Rocky Branch	Approximately 70 feet upstream of U.S. Route 302 (Crawford Notch Road).	+573	+574	Town of Bartlett.
	Approximately 520 feet upstream of U.S. Route 302 (Crawford Notch Road).	+575	+576	
Rocky Branch	Approximately 0.47 miles upstream of U.S. Route 302 (Crawford Notch Road).	+607	+608	Town of Bartlett.
	Approximately 0.90 miles upstream of U.S. Route 302 (Crawford Notch Road).	+655	+656	
Saco River	Approximately 1,970 feet upstream of Maine Central Railroad.	None	+756	Town of Hart's Location.
	Approximately 0.85 miles upstream of Maine Central Railroad.	None	+772	
Shannon Brook	At the Moultonborough Bay confluence	None	+506	Town of Moultonborough.
	Approximately 1.07 miles upstream of State Route 171 (Old Mountain Road).	None	+1202	
Shannon Brook Tributary 1	At the Shannon Brook confluence	None	+550	Town of Moultonborough.
	Approximately 400 feet upstream of State Route 109 (Governor Wentworth Highway).	None	+588	
Squam Lake	Entire shoreline	None	+565	Town of Moultonborough, Town of Sandwich.
Weed Brook	At the Berry Pond confluence	None	+569	Town of Moultonborough, Town of Sandwich.
	Approximately 650 feet upstream of State Route 25 (Whittier Highway).	None	+701	
Weed Brook Diversion	At the Weed Brook Tributary 1 confluence	None	+569	Town of Moultonborough.
	At the Weed Brook divergence	None	+585	
Weed Brook Tributary 1	At the Weed Brook confluence	None	+600	Town of Moultonborough.
	Approximately 1,700 feet upstream of Bodge Hill Road.	None	+785	
Wildcat Brook	Approximately 1,560 feet downstream of Meloon Road.	+1116	+1115	Town of Jackson.
	Approximately 120 feet downstream of Meloon Road	+1177	+1176	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Town of Albany
Maps are available for inspection at the Town Hall, 1972–A State Route 16, Albany, NH 03818.

Town of Bartlett
Maps are available for inspection at the Bartlett Town Hall, 56 Town Hall Road, Intervale, NH 03845.

Town of Effingham
Maps are available for inspection at the Town Hall, 68 School Street, Effingham, NH 03882.

Town of Hart's Location
Maps are available for inspection at the Town Hall, 979 U.S. Route 302, Hart's Location, NH 03812.

Town of Jackson
Maps are available for inspection at the Town Hall, 54 Main Street, Jackson, NH 03846.

Town of Moultonborough
Maps are available for inspection at the Town Hall, 6 Holland Street, Moultonborough, NH 03254.

Town of Ossipee
Maps are available for inspection at the Ossipee Town Hall, 55 Main Street, Center Ossipee, NH 03814.

Town of Sandwich
Maps are available for inspection at the Sandwich Town Hall, 8 Maple Street, Center Sandwich, NH 03227.

Town of Tamworth
Maps are available for inspection at the Town Hall, 84 Main Street, Tamworth, NH 03886.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet(NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Juniata County, Pennsylvania (All Jurisdictions)				
Susquehanna River	At the downstream Northumberland County boundary	+405	+403	Township of Susquehanna.
	At the West Mahantango Creek confluence	+408	+405	
Tuscarora Creek	Approximately 0.9 mile upstream of Groninger Valley Road.	None	+445	Township of Spruce Hill.
	Approximately 3.1 miles upstream of Groninger Valley Road.	None	+461	
West Mahantango Creek	At the Susquehanna River confluence	+408	+405	Township of Susquehanna.
	Approximately 60 feet downstream of Old Trail Road	+408	+407	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Township of Spruce Hill
Maps are available for inspection at the Spruce Hill Township Secretary's Office, 727 Half Moon Road, Port Royal, PA 17082.

Township of Susquehanna
Maps are available for inspection at the Susquehanna Township Hall, 358 Fairground Road, Liverpool, PA 17045.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: July 22, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2011–19546 Filed 8–2–11; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2011–0002; Internal Agency Docket No. FEMA–B–1208]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this proposed rule is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before November 1, 2011

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community is available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–1208, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to

meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

State	City/town/county	Source of flooding	Location **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)	
				Existing	Modified
Unincorporated Areas of Chickasaw County, Iowa					
Iowa	Unincorporated Areas of Chickasaw County.	Little Cedar River (backwater effects from Cedar River).	Approximately 1,200 feet upstream of the Cedar River confluence.	None	+962
			Approximately 100 feet upstream of Beumont Way.	None	+962

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Chickasaw County

Maps are available for inspection at the Chickasaw County Courthouse, 8 East Prospect Street, New Hampton, IA 50659.

Unincorporated Areas of Mingo County, West Virginia					
West Virginia	Unincorporated Areas of Mingo County.	Mate Creek	Approximately 0.21 mile downstream of Norfolk & Western Railway (immediately downstream of County Route 9).	+707	+706

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Mingo County

Maps are available for inspection at the Mingo County Floodplain Management Office, 75 East 2nd Avenue, Room 325, Williamson, WV 25661.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Lake County, Florida, and Incorporated Areas				
Leesburg Tributary 1	Approximately 1,225 feet downstream of the Flying Baron Estates Airport Runway.	+66	+64	City of Leesburg, Unincorporated Areas of Lake County.
	At the downstream side of State Route 44	None	+81	
Leesburg Tributary 2	Approximately 960 feet downstream of Youngs Road.	+67	+66	City of Leesburg, Unincorporated Areas of Lake County.
	Approximately 105 feet upstream of West Main Street.	None	+83	
Leesburg Tributary 2–1	At the Leesburg Tributary 2 confluence	+77	+78	City of Leesburg, Unincorporated Areas of Lake County.
	Approximately 1,410 feet upstream of the Leesburg Tributary 2 confluence.	+77	+78	
Leesburg Tributary 3	Approximately 1,550 feet downstream of Youngs Road.	+64	+65	City of Leesburg, Unincorporated Areas of Lake County.
	Approximately 325 feet upstream of Youngs Road	+77	+76	
Multiple Ponding Areas	Area bound by Violet Avenue to the north, Royal Trails Road to the east, and Maggie Jones Road to the south and west.	None	+42	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Pandorea Avenue to the north, Greenbrier Street to the east, State Route 44 to the south, and Harbor Way to the west.	None	+42	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by County Route 42 to the north, State Route 44 to the east and south, and County Route 439 to the west.	None	+43	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Alder Avenue to the north, Beach Road to the east, Poinciana Street to the south, and Royal Trails Road to the west.	None	+44	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Poinciana Street to the north and east, and Royal Trails Road to the south and west.	None	+44	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Clover Avenue to the north, Wildflower Way to the east, State Route 44 to the south, and Sunflower Street to the west.	None	+44	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Royal Trails Road to the north and east, Poinciana Street to the south, and Tamarac Street to the west.	None	+44	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Maggie Jones Road to the north, Royal Trails Road to the east, State Route 44 to the south, and Lake Norris Road to the west.	None	+45	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Division Street to the north, State Route 44 to the east and south, and Aspen Street to the west.	None	+45	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area approximately 665 feet northeast of the intersection of Royal Trails Road and Maggie Jones Road, bound by West Thyme Avenue to the north, Poinciana Street to the east, Red Oak Avenue to the south, and Royal Trails Road to the west.	None	+45	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Saffron Avenue to the north, State Route 44 to the east, and Royal Trails Road to the south and west.	None	+45	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Sawgrass Fill Road to the north, Royal Trails Road to the east, State Route 44 to the south, and Harbor Way to the west.	None	+46	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Hawthorn Avenue to the north, Alder Way to the east, and Poinciana Street to the south and west.	None	+46	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Apricot Avenue to the north, Fir Street to the east, Quince Avenue to the south, and Royal Trails Road to the west.	None	+46	Unincorporated Areas of Lake County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Multiple Ponding Areas	Area bound by Tamarac Street to the north and west, Royal Trails Road to the east, and Violet Avenue to the south.	None	+46	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Royal Trails Road to the north and west, Viola Way to the east, and West Thyme Avenue to the south.	None	+46	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by West Thyme Avenue to the north, Poinciana Street to the east, Hemlock Lane to the south, and Royal Trails Road to the west.	None	+46	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Bears Lane to the north, Flag Street to the east, Red Oak Avenue to the south, and Jericho Trail to the west.	None	+47	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by West Thyme Avenue to the north, Poinciana Street to the east, and Maggie Jones Road to the south and west.	None	+47	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area approximately 0.4 mile northeast of the intersection of Royal Trails Road and Maggie Jones Road, bound by West Thyme Avenue to the north, Poinciana Street to the east, Red Oak Avenue to the south, and Royal Trails Road to the west.	None	+47	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area approximately 90 feet southeast of the intersection of Royal Trails Road and West Thyme Avenue, bound by West Thyme Avenue to the north, West Thyme Court to the east, Daffodil Avenue to the south, and Royal Trails Road to the west.	None	+47	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Quince Avenue to the north, Cashew Street to the east, Poinciana Street to the south, and Tamarac Street to the west.	None	+47	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Chinaberry Street to the north, Aspen Street to the east, Alder Avenue to the south, and Poinciana Street to the west.	None	+48	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Fullerville Road to the north, Cooter Pond Road to the east, Quince Avenue to the south, and Buck Run Drive to the west.	None	+48	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Quince Avenue to the north, Chinaberry Street to the east and south, and Royal Trails Road to the west.	None	+48	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Saffron Avenue to the north, Mango Street to the east, West Thyme Avenue to the south, and Royal Trails Road to the west.	None	+48	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Seagrape Avenue to the north, Apricot Avenue to the east and south, and Honeysuckle Street to the west.	None	+49	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Saffron Avenue to the north, Chinaberry Street to the east and south, and Royal Trails Road to the west.	None	+49	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Saffron Avenue to the north, Mango Street to the east, Alder Avenue to the south, and Poinciana Street to the west.	None	+49	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by West Thyme Avenue to the north, Aspen Street to the east, Red Oak Avenue to the south, and Royal Trails Road to the west.	None	+49	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by East Thyme Avenue to the north, Aspen Street to the east, Alder Avenue to the south, and Poinciana Street to the west.	None	+49	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Almond Tree Lane to the north, Aspen Street to the east, East Thyme Avenue to the south, and Datura Street to the west.	None	+50	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Quince Avenue to the north, Chinaberry Street to the east, Kumquat Avenue to the south, and Cashew Street to the west.	None	+50	Unincorporated Areas of Lake County.
Multiple Ponding Areas	Area bound by Quince Avenue to the north, West Lake Road to the east, Chinaberry Street to the south, and Cashew Street to the west.	None	+53	Unincorporated Areas of Lake County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Ponding Area	Area bound by Royal Trails Road to the north and east, Tamarac Street to the south, and Maggie Jones Road to the west.	None	+38	Unincorporated Areas of Lake County.
Ponding Area	Area approximately 575 feet southwest of the intersection of Tamarac Street and Violet Avenue, bound by Fullerville Road to the north, Royal Trails Road to the east, and Maggie Jones Road to the south and west.	None	+39	Unincorporated Areas of Lake County.
Ponding Area	Area approximately 470 feet southwest of the intersection of Tamarac Street and Violet Avenue, bound by Fullerville Road to the north, Royal Trails Road to the east, and Maggie Jones Road to the south and west.	None	+40	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Royal Trails Road to the north and east, Saffron Avenue to the south, and Maggie Jones Road to the west.	None	+41	Unincorporated Areas of Lake County.
Ponding Area	Area approximately 340 feet southwest of the intersection of Tamarac Street and Violet Avenue, bound by Fullerville Road to the north, Royal Trails Road to the east, and Maggie Jones Road to the south and west.	None	+41	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Poinciana Street to the north and west, Holly Branch Road to the east, and Steward Road to the south.	None	+41	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Pandorea Avenue to the north, Clover Street to the east, State Route 44 to the south, and Lantana Street to the west.	None	+43	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Larkspur Avenue to the north, State Route 44 to the east and south, and Rabanal Trail to the west.	None	+43	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Rory Lane to the north, State Route 44 to the east and south, and Poinciana Street to the west.	None	+44	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Maggie Jones Road to the north, Royal Trails Road to the east, Red Oak Avenue to the south, and Back Forty Road to the west.	None	+44	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Tamarac Street to the north, Violet Avenue to the east, Royal Trails Road to the south, and Maggie Jones Road to the west.	None	+44	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Royal Trails Road to the north and east, State Route 44 to the south, and Wildflower Way to the west.	None	+45	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Cinnamon Avenue to the north, Fir Street to the east, and Royal Trails Road to the south and west.	None	+45	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Saffron Avenue to the north, Royal Trails Road to the east, Poinciana Street to the south, and Tamarac Street to the west.	None	+45	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Ixora Avenue to the north, Bamboo Street to the east, Lupine Avenue to the south, and Windward Avenue to the west.	None	+46	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Yucca Avenue to the north, Jericho Trail to the east, Pandorea Avenue to the south, and Windward Avenue to the west.	None	+46	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Primrose Lane to the north, Poinciana Street to the east, Red Oak Avenue to the south, and Royal Trails Road to the west.	None	+46	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Red Oak Avenue to the north and east, and Royal Trails Road to the south and west.	None	+46	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Red Oak Avenue to the north, Pandorea Avenue to the east and south, and Jericho Trail to the west.	None	+46	Unincorporated Areas of Lake County.
Ponding Area	Area bound by West Veronica Avenue to the north, Apple Street to the east, Alder Avenue to the south, and Alder Court to the west.	None	+46	Unincorporated Areas of Lake County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Ponding Area	Area bound by Aster Court to the north and west, Royal Trails Road to the east, and Redgum Court to the south.	None	+46	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Division Street to the north, Dahlia Street to the east, Nutmeg Avenue to the south, and Abele Street to the west.	None	+46	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Coconut Avenue to the north, Wildflower Way to the east, State Route 44 to the south, and Sunflower Street to the west.	None	+47	Unincorporated Areas of Lake County.
Ponding Area	Area approximately 1,025 feet southeast of the intersection of Royal Trails Road and Greenbrier Street, bound by Royal Trails Road to the north and east, Wildflower Way to the south, and Greenbrier Street to the west.	None	+47	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Hemlock Lane to the north, Poinciana Street to the east, Primrose Lane to the south, and Royal Trails Road to the west.	None	+47	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Hawthorn Avenue to the north, Alder Way to the east, Alder Avenue to the south, and Poinciana Street to the west.	None	+47	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Chinaberry Street to the north, Persimmon Street to the east, Hawthorn Avenue to the south, and Poinciana Street to the west.	None	+47	Unincorporated Areas of Lake County.
Ponding Area	Area bound by East Veronica Avenue to the north, Rabanal Trail to the east, Scrub Oak Lane to the south, and Poinciana Street to the west.	None	+47	Unincorporated Areas of Lake County.
Ponding Area	Area approximately 580 feet southeast of the intersection of Royal Trails Road and Greenbrier Street, bound by Royal Trails Road to the north and east, Wildflower Way to the south, and Greenbrier Street to the west.	None	+48	Unincorporated Areas of Lake County.
Ponding Area	Area approximately 370 feet southeast of the intersection of Royal Trails Road and West Thyme Avenue, bound by West Thyme Avenue to the north, West Thyme Court to the east, Daffodil Avenue to the south, and Royal Trails Road to the west.	None	+48	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Saffron Avenue to the north, West Saffron Court to the east, Poinciana Street to the south, and Royal Trails Road to the west.	None	+48	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Poinciana Street to the north and east, Viola Way to the south, and Royal Trails Road to the west.	None	+49	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Fullerville Road to the north, Jewell Drive to the east, Seagrape Avenue to the south, and Redlands Drive to the west.	None	+49	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Fullerville Road to the north, Bear Lake Boulevard to the east, Seagrape Avenue to the south, and Buck Run Drive to the west.	None	+49	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Saffron Avenue to the north, West Saffron Court to the west, Vitex Avenue to the south, and Royal Trails Road to the west.	None	+49	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Eddy Lane to the north, Cassia Street to the east, Nutmeg Avenue to the south, and Aspen Street to the west.	None	+49	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Vitex Avenue to the north, Aspen Street to the east, West Thyme Avenue to the south, and Poinciana Street to the west.	None	+50	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Kumquat Avenue to the north, Chinaberry Street to the east and south, and Cashew Street to the west.	None	+50	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Seagrape Avenue to the north, Jewell Drive to the east, Tulip Avenue to the south, and Apricot Avenue to the west.	None	+50	Unincorporated Areas of Lake County.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Ponding Area	Area bound by East Veronica Avenue to the north, Aspen Street to the east, Alder Avenue to the south, and Balsam Street to the west.	None	+51	Unincorporated Areas of Lake County.
Ponding Area	Area bound by East Thyme Avenue to the north, Rabanal Trail to the east, East Veronica Avenue to the south, and Aspen Street to the west.	None	+51	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Verano Drive to the north, Jewell Drive to the east, Buck Lake Road to the south, and Apricot Avenue to the west.	None	+51	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Buck Lake Road to the north, Saint Claire Lake Drive to the east and south, and Chinaberry Street to the west.	None	+51	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Seagrape Avenue to the north, Fir Street to the east, Quince Avenue to the south, and Royal Trails Road to the west.	None	+51	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Vitex Avenue to the north, Shady Rose Court to the east, West Thyme Avenue to the south, and Poinciana Street to the west.	None	+52	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Chinaberry Street to the north, Ash Avenue to the east, East Thyme Avenue to the south, and Kumquat Avenue to the west.	None	+52	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Nutmeg Avenue to the north, Dahlia Street to the east, East Thyme Avenue to the south, and Aspen Street to the west.	None	+52	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Saffron Avenue to the north, West Lake Road to the east, East Thyme Avenue to the south, and Chinaberry Street to the west.	None	+54	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Nutmeg Avenue to the north, Locust Street to the east, Larkspur Avenue to the south, and Dahlia Street to the west.	None	+54	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Quince Avenue to the north, Saint Claire Lake Drive to the east, Saffron Avenue to the south, and Chinaberry Street to the west.	None	+55	Unincorporated Areas of Lake County.
Ponding Area	Area bound by Tulip Avenue to the north, Saint Claire Lake Drive to the east, Quince Avenue to the south, and Chinaberry Street to the west.	None	+56	Unincorporated Areas of Lake County.
Ponding Area D2L	Area bound by South Old Dixie Highway to the north and east, Shiloh Avenue to the south, and Arlington Avenue to the west.	+71	+74	Town of Lady Lake.
St. Johns River	Approximately 2.1 miles upstream of State Route 40.	+6	+7	Unincorporated Areas of Lake County.
	Approximately 2.6 miles upstream of State Route 44.	+6	+7	
Vista Lake	Entire shoreline within community	+108	+106	Unincorporated Areas of Lake County.
Wolf Branch	Approximately 0.9 mile downstream of Wolf Branch Road.	+84	+83	City of Mount Dora, Unincorporated Areas of Lake County.
	Approximately 645 feet upstream of Country Club Boulevard.	+166	+168	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Leesburg

Maps are available for inspection at the Public Works Department, 550 South 14th Street, Leesburg, FL 34748.

City of Mount Dora

Maps are available for inspection at the Building and Zoning Department, 510 North Baker Street, Mount Dora, FL 32757.

Town of Lady Lake

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Maps are available for inspection at the Town Hall, 409 Fennell Boulevard, Lady Lake, FL 32159.				
Unincorporated Areas of Lake County				
Maps are available for inspection at the Lake County Public Works Department, 437 Ardice Avenue, Eustis, FL 32726.				
Lafayette Parish, Louisiana, and Incorporated Areas				
Anselm Coulee	At the upstream side of the Vermillion River confluence.	None	+14	City of Youngsville.
	At the downstream side of the Isaac Verot Coulee confluence.	None	+24	
Coulee Des Poches	At the Vermillion River confluence	+17	+18	City of Lafayette, Unincorporated Areas of Lafayette Parish.
	Approximately 125 feet upstream of South Pacific Railroad.	+27	+28	
Coulee Lasalle	Approximately 0.3 mile downstream of Le Triomphe Parkway.	None	+24	Town of Broussard, City of Youngsville.
	Approximately 0.9 mile upstream of Cane Brake Road.	None	+25	
Coulee Mine	At the Vermillion River confluence	+16	+17	Unincorporated Areas of Lafayette Parish.
	At the downstream side of Malapart Road	None	+46	
Isaac Verot Coulee	At the Vermillion River confluence	+15	+16	City of Lafayette, Unincorporated Areas of Lafayette Parish.
	At the upstream side of the Anselm Coulee confluence.	None	+24	
Isaac Verot Coulee—Lateral 2.	At the Isaac Verot Coulee confluence	None	+24	Town of Broussard.
	At the downstream side of State Highway 89	None	+36	
Vermillion River	Approximately 600 feet upstream of the Anselm Coulee confluence.	+14	+15	City of Lafayette.
	Approximately 1.5 miles upstream of State Highway 726.	+22	+21	
Webb Coulee Lower Reach	Approximately 0.75 mile upstream of the Vermillion River confluence.	+15	+16	City of Lafayette, Unincorporated Areas of Lafayette Parish.
	At the Jupiter Street Coulee confluence	+30	+27	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Lafayette
Maps are available for inspection at 705 West University Avenue, Lafayette, LA 70506.

City of Youngsville
Maps are available for inspection at 305 Iberia Street, Youngsville, LA 70592.

Town of Broussard
Maps are available for inspection at 416 East Main Street, Broussard, LA 70518.

Unincorporated Areas of Lafayette Parish
Maps are available for inspection at 101 East Cypress Street, Lafayette, LA 70501.

Alcona County, Michigan (All Jurisdictions)				
Lake Huron	Entire shoreline within community	None	+583	City of Harrisville, Township of Alcona, Township of Harrisville, Township of Haynes.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Harrisville
Maps are available for inspection at City Hall, 200 5th Street, Harrisville, MI 48740.

Township of Alcona
Maps are available for inspection at the Alcona Township Hall, 5576 North U.S. Route 23, Black River, MI 48721.

Township of Harrisville
Maps are available for inspection at the Township Hall, 114 South Poor Farm Road, Harrisville, MI 48740.

Township of Haynes
Maps are available for inspection at the Haynes Township Hall, 3930 East McNeill Road, Lincoln, MI 48742.

Menominee County, Michigan (All Jurisdictions)

Green Bay	Entire shoreline within community	+584	+585	City of Menominee, Township of Cedarville, Township of Ingallston, Township of Menominee.
Menominee River	At the Green Bay confluence	+584	+585	City of Menominee.
	Approximately 700 feet downstream of Canadian National Railway.	+584	+585	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Menominee
Maps are available for inspection at City Hall, 2511 10th Street, Menominee, MI 49858.

Township of Cedarville
Maps are available for inspection at the Cedarville Township Hall, Old Mill Road and M–35, Cedar River, MI 49887.

Township of Ingallston
Maps are available for inspection at the Ingallston Township Hall, W3790 Town Hall Lane No. 13.5, Wallace, MI 49893.

Township of Menominee
Maps are available for inspection at the Township Hall, N2283 O1 Drive, Menominee, MI 49858.

Blue Earth County, Minnesota, and Incorporated Areas

Blue Earth River	At the Minnesota River confluence	+785	+783	City of Mankato, City of Skyline, Unincorporated Areas of Blue Earth County.
	Approximately 0.5 mile downstream of Hawthorn Road.	None	+785	
County Ditch 56	At the Lake Crystal confluence	None	+973	City of Lake Crystal, Unincorporated Areas of Blue Earth County.
	Approximately 0.7 mile upstream of County Highway 9.	None	+979	
Minnesota River	At the upstream side of the Le Sueur County boundary.	+769	+768	City of Mankato, Unincorporated Areas of Blue Earth County.
	Approximately 2.5 miles upstream of 480th Lane	+804	+805	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Lake Crystal
Maps are available for inspection at City Hall, 100 East Robinson Street, Lake Crystal, MN 56055.

City of Mankato
Maps are available for inspection at the Intergovernmental Center, 10 Civic Center Plaza, Mankato, MN 56001.

City of Skyline
Maps are available for inspection at City Hall, 23 Skyline Drive, Mankato, MN 56001.

Unincorporated Areas of Blue Earth County
Maps are available for inspection at the Blue Earth County Environmental Department, 410 South 5th Street, Mankato, MN 56001.

Jasper County, Missouri, and Incorporated Areas

Brownell West	At the Silver Creek Tributary 2 confluence	None	+1011	City of Joplin.
	At the downstream side of East 32nd Street	None	+1025	
Center Creek Tributary 28 (backwater effects from Center Creek).	From approximately 500 feet upstream of the Center Creek confluence to approximately 1,012 feet upstream of the Center Creek confluence.	None	+852	Unincorporated Areas of Jasper County.
Eagle Picher Creek	Approximately 1,010 feet upstream of Northwest Murphy Boulevard.	None	+959	City of Joplin.
	Approximately 75 feet downstream of West 2nd Street.	None	+989	
Eagle Picher Creek Tributary 1.	At the Eagle Picher Creek confluence	None	+978	City of Joplin.
	Approximately 81 feet downstream of North Maiden Lane.	None	+991	
Silver Creek Tributary 2	Approximately 776 feet upstream of the Silver Creek confluence.	+986	+988	City of Joplin.
	Approximately 77 feet downstream of East 32nd Street.	None	+1021	
Swifty Creek	Approximately 114 feet upstream of I–44	+1088	+1086	City of Sarcoxie, Unincorporated Areas of Jasper County.
	Approximately 500 feet upstream of 5th Street	+1097	+1099	
Tin Cup Creek	Approximately 289 feet upstream of 32nd Street	+974	+973	City of Joplin.
	Approximately 178 feet upstream of West 30th Street.	None	+988	
Turkey Creek Tributary 3 (overflow effects from Turkey Creek).	At the Turkey Creek confluence	+994	+995	City of Joplin, Village of Duquesne.
	Approximately 1,941 feet downstream of I–44	None	+997	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Joplin
Maps are available for inspection at City Hall, 602 South Main Street, Joplin, MO 64801.

City of Sarcoxie
Maps are available for inspection at City Hall, 111 North 6th Street, Sarcoxie, MO 64862.

Unincorporated Areas of Jasper County
Maps are available for inspection at the Jasper County Courthouse, 302 South Main Street, Carthage, MO 64836.

Flooding source(s)	Location of referenced elevation **	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Village of Duquesne				
Maps are available for inspection at City Hall, 1501 South Duquesne Road, Duquesne, MO 64802.				

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: July 22, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2011–19549 Filed 8–2–11; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1101]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule; correction.

SUMMARY: On May 25, 2010, FEMA published in the **Federal Register** a proposed rule that contained an erroneous table. This notice provides corrections to that table, to be used in lieu of the information published at 75 FR 29290. The table provided here represents the flooding sources, location of referenced elevations, effective and modified elevations, and communities affected for Anne Arundel County, Maryland, and Incorporated Areas. Specifically, it addresses the following flooding sources: Cabin Branch, Franklin Branch, Hall Creek, Little Patuxent River, Marley Creek, Midway Branch, Patapsco River, Patuxent River, Sawmill Creek, and Severn Run.

DATES: Comments are to be submitted on or before November 1, 2011.

ADDRESSES: You may submit comments, identified by Docket No. FEMA–B–1101, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064 or (e-mail) *luis.rodriguez1@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064 or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) publishes proposed determinations of Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs for communities participating in the National Flood Insurance Program (NFIP), in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are minimum requirements. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Corrections

In the proposed rule published at 75 FR 29290, in the May 25, 2010, issue of the **Federal Register**, FEMA published a table under the authority of 44 CFR 67.4. The table, entitled ''Anne Arundel County, Maryland, and Incorporated Areas'' addressed the following flooding sources: Cabin Branch, Franklin Branch, Little Patuxent River, Marley Creek, Midway Branch, Patapsco River, Patuxent River, Sawmill Creek, and Severn Run. That table contained inaccurate information as to the location of referenced elevation, effective and modified elevation in feet, and/or communities affected for those flooding sources. In addition, it did not include the flooding source Hall Creek. In this notice, FEMA is publishing a table containing the accurate information, to address these prior errors. The information provided below should be used in lieu of that previously published.

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Anne Arundel County, Maryland, and Incorporated Areas				
Cabin Branch	Approximately 122 feet downstream of Chessie System.	+8	+7	Unincorporated Areas of Anne Arundel County.
	Approximately 325 feet upstream of Andover Road	+115	+118	
Franklin Branch	At the Midway Branch confluence	None	+127	Unincorporated Areas of Anne Arundel County.

Flooding source(s)	Location of referenced elevation**	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
	Approximately 780 feet upstream of Clark Road	None	+214	
Hall Creek	At the most downstream Calvert County boundary	+43	+40	Unincorporated Areas of Anne Arundel County.
	At the most upstream Calvert County boundary	+54	+52	
Little Patuxent River	Approximately 600 feet upstream of the Patuxent River confluence.	+43	+46	Unincorporated Areas of Anne Arundel County.
	Approximately 1,456 feet upstream of Brock Bridge Road.	+130	+132	
Marley Creek	Approximately 485 feet upstream of Arundel Expressway.	+8	+7	Unincorporated Areas of Anne Arundel County.
	Approximately 165 feet upstream of Elevation Road	+28	+26	
Midway Branch	At the Little Patuxent River confluence	+76	+85	Unincorporated Areas of Anne Arundel County.
	Approximately 0.58 mile upstream of Clark Road	None	+211	
Patapsco River	Approximately 0.77 mile downstream of the Harbor Tunnel Thruway.	+9	+12	Unincorporated Areas of Anne Arundel County.
	Approximately 200 feet upstream of I–195	+25	+26	
Patuxent River	Approximately 0.56 mile downstream of Southern Maryland Boulevard.	+9	+8	Unincorporated Areas of Anne Arundel County.
	Approximately 0.57 mile upstream of Laurel Fort Meade Road.	+139	+140	
Sawmill Creek	At the upstream side of Crain Highway	+8	+10	Unincorporated Areas of Anne Arundel County.
	Approximately 400 feet upstream of Washington Baltimore and Annapolis Road.	None	+105	
Severn Run	Approximately 0.43 mile downstream of Veterans Highway.	+6	+7	Unincorporated Areas of Anne Arundel County.
Approximately 0.5 mile upstream of Telegraph Road.	+97	+98		

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.
** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

Unincorporated Areas of Anne Arundel County

Maps are available for inspection at the Anne Arundel County Permit Application Center, 2664 Riva Road, Annapolis, MD 21401.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: July 24, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2011–19545 Filed 8–2–11; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–B–1105]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule; correction.

SUMMARY: On June 3, 2010, FEMA published in the **Federal Register** a proposed rule that contained an erroneous table. This notice provides corrections to that table, to be used in lieu of the information published at 75 FR 31373. The table provided here represents the flooding sources, location of referenced elevations, effective and modified elevations, and communities affected for Lawrence County, Missouri, and Incorporated Areas. Specifically, it addresses the following flooding sources: Chapel Drain, Clear Creek, Kelly Creek Tributary, Tributary No. 1, Tributary 2, Unnamed Tributary, Unnamed Tributary Number 1, Unnamed Tributary Number 2, Unnamed Tributary Number 3, and Unnamed Tributary Number 4.

DATES: Comments are to be submitted on or before November 1, 2011.

ADDRESSES: You may submit comments, identified by Docket No. FEMA–B–

1105, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064 or (e-mail) *luis.rodriguez1@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064 or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) publishes proposed determinations of Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs for communities participating in the National Flood Insurance Program (NFIP), in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are minimum requirements. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings.

Corrections

In the proposed rule published at 75 FR 31373, in the June 3, 2010, issue of the **Federal Register**, FEMA published a table under the authority of 44 CFR 67.4. The table, entitled ''Lawrence County, Missouri, and Incorporated Areas'' addressed the following flooding sources: Kelly Creek Tributary, Tributary No. 1, Unnamed Tributary, Unnamed Tributary Number 1, Unnamed Tributary Number 2, Unnamed Tributary Number 3, and Unnamed Tributary Number 4. That table contained inaccurate information as to the location of referenced elevation, effective and modified elevation in feet, and/or communities affected for those flooding sources. In addition, it did not include the following flooding sources: Chapel Drain, Clear Creek, and Tributary 2. In this notice, FEMA is publishing a table containing the accurate information, to address these prior errors. The information provided below should be used in lieu of that previously published.

Flooding source(s)	Location of referenced elevation**	*Elevation in feet NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	
Lawrence County, Missouri, and Incorporated Areas				
Chapel Drain	Approximately 50 feet upstream of Farm Road 1090	None	+1335	Unincorporated Areas of Lawrence County.
	Approximately 0.71 mile upstream of Farm Road 1090.	None	+1379	
Clear Creek	Approximately 250 feet downstream of Farm Road 1050.	None	+1233	Unincorporated Areas of Lawrence County.
	Just upstream of the Barry County boundary	None	+1243	
Kelly Creek Tributary	Approximately 0.45 mile downstream of Farm Road 2230.	None	+1365	Unincorporated Areas of Lawrence County.
	Approximately 100 feet upstream of Farm Road 2230	None	+1401	
Tributary No. 1	Approximately 50 feet upstream of the Unnamed Tributary confluence.	None	+1326	Unincorporated Areas of Lawrence County.
	Approximately 275 feet upstream of State Highway 37	None	+1333	
Tributary 2	Just upstream of the Unnamed Tributary confluence	None	+1357	Unincorporated Areas of Lawrence County.
	Approximately 900 feet upstream of State Route H	None	+1377	
Unnamed Tributary	Approximately 1,675 feet downstream of the Barry County boundary.	None	+1277	Unincorporated Areas of Lawrence County.
	Approximately 550 feet upstream of Farm Road 2230	None	+1383	
Unnamed Tributary Number 1.	Approximately 200 feet downstream of Washington Avenue.	None	+1372	City of Aurora.
	Approximately 525 feet upstream of Union Street	None	+1406	
Unnamed Tributary Number 2.	Approximately 600 feet upstream of South Street	None	+1359	City of Aurora.
	Approximately 100 feet upstream of Prospect Street	None	+1402	
Unnamed Tributary Number 3.	Approximately 250 feet upstream of the Unnamed Tributary Number 2 confluence.	None	+1376	City of Aurora.
	Approximately at Tyler drive	None	+1390	
Unnamed Tributary Number 4.	Approximately 215 feet upstream of Saint Louis Street.	None	+1361	City of Aurora.
	Approximately 650 feet upstream of Lincoln Avenue	None	+1381	

* National Geodetic Vertical Datum.
# North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

Flooding source(s)	Location of referenced elevation**	*Elevation in feet NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

** BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

ADDRESSES

City of Aurora

Maps are available for inspection at 2 West Pleasant Street, Aurora, MO 65712.

Unincorporated Areas of Lawrence County

Maps are available for inspection at 1 East Courthouse Square, Mt. Vernon, MO 65712.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: July 22, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2011–19548 Filed 8–2–11; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 110621347–1385–02]

RIN 0648–BB19

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the Southern Atlantic States; Control Date for Commercial Wreckfish Sector

AGENCY: Commerce, National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS).

ACTION: Advanced Notice of Proposed Rulemaking; Consideration of a Control Date.

SUMMARY: NMFS announces that it is establishing a new control date of March 11, 2011, to control future access to the commercial wreckfish sector of the snapper-grouper fishery operating in the exclusive economic zone (EEZ) of the South Atlantic. If changes to the management regime are developed and implemented under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), a control date could be used to limit the number of participants in this commercial sector. This announcement is intended, in part, to promote awareness of the potential eligibility criteria for future access so as to discourage speculative entry into this sector while the South Atlantic Fishery Management Council (Council) and NMFS consider whether and how access to the commercial wreckfish sector should be controlled.

DATES: Written comments must be received on or before 5 p.m., local time, September 2, 2011.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2011–0152, by the following method:

• *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the Federal e-rulemaking portal *http://www.regulations.gov*, select ''submit a comment,'' enter the following docket number into the ''Search'' box: NOAA–NMFS–2011–0152. To view posted comments during the comment period, enter ''NOAA–NMFS–2011–0152'' in the keyword search and click on ''search.'' NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council; toll free 1–866–SAFMC–10 or 843–571–4366; *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: Previously, the Council established a control date of March 28, 1990, for the commercial wreckfish sector of the snapper-grouper fishery. Subsequent to that action, an individual transferable quota program was implemented for wreckfish in 1992. The Council is currently developing Amendments 20A and 20B to the Snapper-Grouper Fishery Management Plan (FMP) regarding wreckfish. Therefore, at its March 2011 meeting, the Council recommended a new control date of March 11, 2011, for the commercial wreckfish sector. The Council manages wreckfish under the FMP for the Snapper-Grouper Fishery of the South Atlantic Region. The new control date would apply to current wreckfish ITQ shareholders as well as persons who are contemplating entering the commercial wreckfish sector in the EEZ of the South Atlantic region. If adopted, a new control date would be established for the commercial wreckfish sector. The Council requested that this control date be published in the **Federal Register**, in part, to notify fishermen that if they enter this sector after March 11, 2011, they may not be assured of future access if the Council and/or NMFS decide to limit entry or impose other management measures.

Establishment of the new control date would allow the Council to limit the level of participation in the subject sector using the March 11, 2011, date as part of a management strategy. Control dates are intended to discourage speculative entry into a sector of that fishery, as new entrants entering after the control date are forewarned that they are not guaranteed future participation.

Establishment of this new control date does not commit the Council or NMFS

to any particular management regime or criteria for entry into the commercial wreckfish sector. Fishermen are not guaranteed future participation in the sector regardless of their level of participation before or after the control date. The Council may recommend a different control date or it may recommend a management regime that does not involve a control date. Other criteria, such as documentation of landings or fishing effort, may be used to determine eligibility for participation in a limited access fishery. The Council and/or NMFS also may choose to take no further action to control entry or access to the subject sector, in which case the control date may be rescinded. Any action by the Council will be taken pursuant to the requirements for fishery management plan and amendment development established under the Magnuson-Stevens Act.

This notification also gives the public notice that interested participants should locate and preserve records that substantiate and verify their participation in the commercial wreckfish sector in the South Atlantic EEZ.

This rule has been determined to be not significant under E.O. 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 28, 2011.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 2011–19667 Filed 8–2–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 110711384–1398–01]

RIN 0648–XA470

Western Pacific Bottomfish and Seamount Groundfish Fisheries; 2011–12 Main Hawaiian Islands Deep 7 Bottomfish Annual Catch Limits and Accountability Measures

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed specification; request for comments.

SUMMARY: NMFS proposes to specify a quota (annual catch target, ACT) of 325,000 lb (147,418 kg) of Deep 7 bottomfish in the main Hawaiian Islands (MHI) for the 2011–12 fishing year, based on a proposed annual catch limit (ACL) of 346,000 lb (156,943 kg). When the fishery is projected to reach the quota, NMFS would close, as an accountability measure, the commercial and non-commercial fisheries for MHI Deep 7 bottomfish for the remainder of the fishing year. The proposed specifications and fishery closure support the long-term sustainability of Hawaii bottomfish.

DATES: Comments must be received by August 18, 2011.

ADDRESSES: Comments on this proposed specification, identified by 0648–XA470, may be sent to either of the following addresses:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *http://www.regulations.gov*; or
- *Mail:* Mail written comments to Michael D. Tosatto, Regional Administrator, NMFS, Pacific Islands Region (PIR), 1601 Kapiolani Blvd, Suite 1110, Honolulu, HI 96814–4700.

Instructions: Comments must be submitted to one of the two addresses to ensure that the comments are received, documented, and considered by NMFS. Comments sent to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *http://www.regulations.gov* without change. All personal identifying information (*e.g.*, name, address, etc.) submitted voluntarily by the sender may be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

An environmental assessment (EA) was prepared that describes the impact on the human environment that would result from this proposed action. Based on the EA, NMFS prepared a finding of no significant impact (FONSI) for the proposed action. Copies of the EA and FONSI are available from *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Jarad Makaiau, NMFS PIR Sustainable Fisheries, 808–944–2108.

SUPPLEMENTARY INFORMATION: The bottomfish fishery in Federal waters around Hawaii is managed under the Fishery Ecosystem Plan for the Hawaiian Archipelago (Hawaii FEP), developed by the Western Pacific Fishery Management Council (Council) and implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Amendment 3 to the Hawaii FEP established a process for the Council and NMFS to specify annual catch limits and accountability measures; that process is codified at 50 CFR 665.4 (76 FR 37285, June 27, 2011). The regulations require NMFS to specify an ACL for MHI Deep 7 bottomfish each fishing year, based on a recommendation from the Council. The Deep 7 bottomfish are onaga (*Etelis coruscans*), ehu (*E. carbunculus*), gindai (*Pristipomoides zonatus*), kalekale (*P. sieboldii*), opakapaka (*P. filamentosus*), lehi (*Aphareus rutilans*), and hapuupuu (*Epinephelus quernus*).

The Council's recommendation of an ACL of 346,000 lb (156,943 kg) considers the most recent bottomfish stock assessment, risk of overfishing, past fishery performance, recommendations from its Scientific and Statistical Committee (SSC), and input from the public. The proposed ACL is based on a 2010 stock assessment that indicated that the MHI Deep 7 bottomfish were not overfished and not subject to overfishing. The proposed ACL is associated with less than a 41 percent probability of overfishing the Deep 7 bottomfish in the MHI.

Management uncertainty, influenced by unreported recreational landings, accuracy of commercial catch reporting, weather influences on the fishing activity and productivity, monitoring and forecasting capabilities, and mortality of recreational catch discards associated with high-grading, could cause the fishery to exceed the ACL. Accordingly, the Council recommended a quota (annual catch target, ACT) of 325,000 lb (147,418 kg), about six percent (21,000 lb or 9,525 kg) lower than the ACL, to provide a sufficient buffer to ensure that the fishery does not exceed the ACL.

If the quota (ACT) is projected to be reached before August 31 (the end of the fishing year), NMFS will close the non-commercial and commercial fisheries for Deep 7 bottomfish in Federal waters through August 31. When NMFS closes Federal waters to fishing for Deep 7 bottomfish, State of Hawaii law allows the State to adopt a complementary closure of the Deep 7 fishery in State waters. During a closure for Deep 7 bottomfish, no person may fish for, possess, or sell any of these fish in the MHI, except as otherwise authorized by law. Specifically, fishing for, and the resultant possession or sale of, Deep 7

bottomfish by vessels legally registered to Pacific Remote Island Area bottomfish fishing permits, and conducted in compliance with all other laws and regulations, are not affected by the closure. There is no prohibition on fishing for or selling other non-Deep 7 bottomfish species throughout the year.

NMFS will consider public comments on the proposed ACL and quota (ACT) and will announce the final specifications prior to the scheduled reopening of the fishery on September 1, 2011. The fishery will continue until August 31, 2012, unless the fishery is closed earlier because the quota is reached. Regardless of the final ACL and quota, all other management measures will continue to apply in the MHI bottomfish fishery.

To be considered, comments on these proposed specifications must be received by August 18, 2011, not postmarked or otherwise transmitted by that date.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator for Fisheries has determined that this proposed specification is consistent with the Hawaii FEP, other provisions of the Magnuson-Stevens Act, and other applicable laws, subject to further consideration after public comment.

Certification of Finding of No Significant Impact on Substantial Number of Small Entities

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that these proposed specifications, if adopted, would not have a significant economic impact on a substantial number of small entities.

A description of the action, why it is being considered, and the legal basis for it are contained in the preamble to this proposed specification.

''The proposed action would specify the annual catch limit (ACL) and accountability measures (AM) for MHI Deep 7 bottomfish for the non-commercial and commercial fisheries for 2011–12. In the 2010–11 fishing year (September 1, 2010, through March 12, 2011), 475 vessels engaged in the commercial harvest of MHI Deep 7 bottomfish. The 2010–11 average gross revenue per vessel was $3,347, based on an average price of $5.93 per pound, and harvest of 268,089 lb (121,603 kg). In general, the relative importance of MHI bottomfish to commercial participants as a percentage of overall fishing or household income is unknown, as the total suite of fishing and other income-generating activities by individual operations across the year has not been examined. Based on available information, NMFS has determined that all vessels in the current fishery are small entities under the Small Business Administration definition of a small entity, *i.e.,* they are engaged in the business of fish harvesting, are independently owned or operated, are not dominant in their field of operation, and have annual gross receipts not in excess of $4 million. Therefore, there are no disproportionate economic impacts between large and small entities. Furthermore, there are no disproportionate economic impacts among the universe of vessels based on gear, home port, or vessel length.

Assuming an average price of $5.93 per lb and 475 participating vessels, the proposed 2011–12 ACL of 346,000 lb (156,943 kg) is expected to yield $2,051,780 in total revenue, or an average of $4,319 in revenue per vessel, compared to $3,347 per vessel realized in the 2010–11 fishery. Even though there would be a substantial number of vessels, *i.e.,* 100 percent of the bottomfish fleet, affected by this specification, there would be no significantly adverse economic impact to individual vessels resulting from the implementation of this specification. Therefore, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), NMFS has determined that this rule will not have a significant economic impact on a substantial number of small entities.''

As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This action is exempt from review under the procedures of E.O. 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 28, 2011.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 2011–19665 Filed 8–2–11; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 76, No. 149

Wednesday, August 3, 2011

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

Forest Service

Salmon-Challis National Forest, ID; Upper North Fork HFRA Ecosystem Restoration Project Environmental Impact Statement

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The North Fork Ranger District, Salmon-Challis National Forest, is proposing an integrated hazardous fuels and forest restoration project in the Upper North Fork drainage. The approximately 41,000 acre planning area is being considered for treatments consisting primarily of prescribed burning and mechanical thinning. The drainage area includes the communities of Moose Creek Estates, Royal Elk Ranch, Lost Trail Ski Area, Gibbonsville and North Fork which have widespread private land resources, and have been identified as ''at-risk'' communities by Lemhi County and the State of Idaho. Lemhi County's Wildfire Prevention Plan has designated the North Fork drainage as high priority for hazardous fuel reduction, an essential criteria allowing the use of authorities and expedited environmental analysis under the Healthy Forest Restoration Act (HFRA) of 2003. A collaborative process was used to obtain suggestions and input on restoration needs and potential activities for this project area to improve the health of the ecosystem and reach the desired future condition.

DATES: Comments concerning the scope of the analysis must be received by September 2, 2011. The draft environmental impact statement is expected in November, 2011 and the final environmental impact statement is expected in March, 2012.

ADDRESSES: Send written comments to Russell Bacon, North Fork District Ranger, *Attn:* Upper North Fork HFRA Ecosystem Restoration Project EIS, P.O. Box 180, 11 Casey Rd., North Fork, ID 83466. Comments may also be sent via e-mail to *comments-intermtn-salmon-challis-northfork@fsfed.us,* or via facsimile to (208) 865–2738.

FOR FURTHER INFORMATION CONTACT: Maggie Milligan, Project Team Leader, at (208) 865–2711 or visit the Forest Web site *http://www.fs.fed.us/r4/sc/projects/.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

Existing forest stand structure and forest vegetation have created the potential for large-scale, high-intensity wildfires that threaten human life, property, and natural resources. Quaking aspen stands provide substantial habitat value for wildlife and contribute to landscape habitat diversity. However, many historic aspen stands in Central Idaho have been lost, and many others are either regenerating poorly or are otherwise in decline. Likewise, whitebark pine is being considered as the first tree species in the Northwest to be listed as endangered because of a lethal combination of blister rust and mountain pine beetle. Historic logging practices and fire suppression have contributed to a decline in ponderosa pine, known to be more fire resilient. In essence, the rich biodiversity in the project area is at risk.

This area contains the State Highway 93 transportation corridor and scenic byway, private lands, residences and a winter recreation ski facility classified by Lemhi County as wildland urban interface (WUI). The purpose is to reduce hazardous natural fuels, restore plant communities and improve fish and wildlife habitat diversity while returning resilient conditions to this fire adapted landscape. This proposal is necessary to compliment other existing, on-going and planned fuels treatments surrounding ''at-risk'' communities within the North Fork drainage, and to address forest health conditions that are reaching crucial stages towards non-desired change.

Private developments, such as Moose Creek Estates, have responded to these needs and have already completed planning and hazard reduction treatments necessary to gain enrollment as a ''Fire-Wise Community'' in the State of Idaho.

Proposed Action

Hazardous fuels treatments and associated opportunities have been identified by the Salmon-Challis National Forest for this project through extensive discussions, focused site visits and numerous exchanges of ideas with the Lemhi County Forest Restoration Group and other local community members. Three Idaho Roadless Areas are in the project area. Ladder fuel reduction along road corridors, shaded fuel break creation in strategic locations adjacent to private land and other developments, restoration treatments for mountain meadow and aspen and whitebark pine communities, old growth stand protection, re-establishing landscape fire resilience through prescribe burning, fish habitat and passage restoration are activities proposed for the project. Integrated and adaptive invasive weed management would be an integral activity with all the proposed treatments and restoration actions.

The proposed action includes commercially thinning from below to reduce the understory on approximately 5,123 acres of the project area; 2,687 acres of tractor logging, 1,332 acres of skyline logging and 1,104 acres of helicopter logging. All emphasis would be to retain large trees; whole tree skidding to facilitate use of tree tops and slash as biomass or for pile burning. All slash piles would be left onsite for 1 year for possible biomass utilization. Pre-commercial thinning would occur within the commercial units and in 1300 additional acres. All thinning (commercial/precommercial) units would receive a follow-up prescribed burning treatment.

The project would use the existing transportation system except for the construction of approximately 14 miles of new temporary road of which 2.8 miles are proposed within Idaho Roadless Areas. All new roads or other roads currently closed would be rehabilitated and closed following use. Additionally, 53 miles of non-system roads in the project ara would be decommissioned.

Two site-specific Forest Plan Amendments are proposed in association with this project to change

current requirements and prescriptions which limit treatments and activities needed to attain the desired future condition in the project area. Proposed Site Specific Amendment #1—Wildland Fire Management would more closely align with Federal Wildland Fire policy by allowing for the use of unplanned ignitions to meet project objectives. Proposed Site Specific Amendment #2—Big Game Winter Range would change direction regarding cover to forage ratios within management area (MA) 4A in order to achieve fuels reduction objective in this HFRA project.

Responsible Official

Regional Forester, Intermountain Region, 324 25th St., Ogden, UT 84401.

Nature of Decision To Be Made

An environmental impact statement (EIS) that discloses the environmental consequences of implementing the proposed action and alternatives to the proposed action will be prepared. A separate Record of Decision (ROD) will explain the Regional Forester's decision regarding whether or not to implement some level of fuels reduction and other proposed activities on all, part, or none of the area analyzed, given the consideration of multiple-use goals and objectives.

Scoping Process

This notice of intent initiates the scoping process, which guides the development of the environmental impact statement. Comments that would be most useful are those concerning developing or refining the proposed action, in particular are site specific concerns and those that can help us develop treatments and activities that would be responsive to our goal to reduce hazardous fuel conditions, risks to communities from uncharacteristic high-intensity wildfires and landscape restoration needs in the project. It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, we ask that input be timely and clearly articulate the reviewer's concerns and contentions. Section 104(e) of the HFRA requires agencies to provide notice of the project and conduct a public meeting when preparing authorized hazardous-fuel-reduction projects. A public meeting is scheduled for Thursday, August 18th, 2011 at 6:30pm at the Gibbonsville Improvement Association Building. Additional public meetings are anticipated to be held following publication of the Draft Environmental Impact Statement.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the Agency with the ability to provide the respondent with subsequent environmental documents.

Dated: July 26, 2011.

Frank V. Guzman,

Forest Superviser.

[FR Doc. 2011–19493 Filed 8–2–11; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Southern New Mexico Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Southern New Mexico Resource Advisory Committee will meet in Socorro, New Mexico. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is to review project proposals to be initiated with title II funds.

DATES: The meeting will be held August 25, 2011, 8 a.m.

ADDRESSES: The meeting will be held at Socorro County Annex Building, 198 Neel Avenue. The public may access the teleconference by calling the conference bridge number at 1–877–855–4797 and authorization code 6540381V starting at 8:30 a.m. Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Wilderness Ranger District, HC 68 Box 50, Mimbres, NM 88049–9301. Please call ahead to 575–536–2250 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Mr. Al Koss, Designated Federal Official, 575–536–2250 or *akoss@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday. Requests for reasonable accomodation for access to the facility or procedings may be made by contacting the person listed **FOR FURTHER INFORMATION**.

SUPPLEMENTARY INFORMATION: The following business will be conducted: (1) Review of project proposals for initiation of title II funds; and (2) Public comment. The full agenda and order of proposal presentations can be found at *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/RAC/Southern+New+Mexico?OpenDocument.*

Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by August 15 to be scheduled on the agenda.

Written comments and requests for time for oral comments must be sent to Patti Turpin, Lincoln National Forest, 3463 Las Palomas Road, Alamogordo, New Mexico, 88310, or by e-mail to *pturpin@fs.fed.us,* or via facsimile to 575–434–7218. A summary of the meeting will be posted at *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/RAC/Southern+New+Mexico?OpenDocument* within 21 days of the meeting.

July 29, 2011.

Alan E. Koss,

Designated Federal Official.

[FR Doc. 2011–19616 Filed 8–2–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Tuolumne-Mariposa Counties Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Tuolumne-Mariposa Counties Resource Advisory Committee (RAC) will meet on August 15, 2011 at the City of Sonora Fire Department, in Sonora, California. The primary purpose of the meeting is to vote on which projects to fund.

DATES: The meeting will be held August 15, 2011, from 12 p.m. to 3 p.m.

ADDRESSES: The meeting will be held at the City of Sonora Fire Department located at 201 South Shepherd Street, in Sonora, California (CA 95370).

FOR FURTHER INFORMATION CONTACT: Beth Martinez, Committee Coordinator, USDA, Stanislaus National Forest, 19777 Greenley Road, Sonora, CA 95370 (209) 532–3671, extension 320; EMAIL *bethmartinez@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items include: (1) Project voting, (2) Public comment. This meeting is open to the public.

Dated: July 28, 2011.

Christina M. Welch,

Deputy Forest Supervisor.

[FR Doc. 2011–19611 Filed 8–2–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Deschutes Provincial Advisory Committee (DPAC)

AGENCY: Forest Service, Agriculture.

ACTION: Notice of meeting.

SUMMARY: The Deschutes Provincial Advisory Committee will meet on July 22, 2011 to conduct a field trip to review projects relevant to the goals and objectives of the committee. Members will meet at the Deschutes National Forest Supervisor's office, Upper Deschutes Conference Room (1001 SW Emkay Drive, Bend Oregon) at 9 a.m. The field trip will be from 9:30 a.m. until 2 p.m. All Deschutes Province Advisory Committee meetings are open to the public.

FOR FURTHER INFORMATION CONTACT: Michael Keown, Province Liaison, Sisters Ranger District, Pine Street and Highway 20, Sisters, Oregon 97759, Phone (541) 549–7735.

John Allen,

Deschutes National Forest Supervisor.

[FR Doc. 2011–19382 Filed 8–2–11; 8:45 am]

BILLING CODE 3410–11–M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the New Jersey Advisory Committee to the U.S. Commission on Civil Rights

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that a planning meeting of the of the New Jersey Advisory Committee to the U.S. Commission on Civil Rights will convene at 10 a.m. on Wednesday, August 17, 2011 at the Legislative Annex, 125 West State Street, 1st Floor Annex, Committee Room 115, Trenton, New Jersey 08625. The purpose of the planning meeting is to review and discuss the draft report on services provided to persons with non-apparent disabilities who are incarcerated in New Jersey state prisons. The draft report was prepared by the subcommittee of the New Jersey Advisory Committee to the U.S. Commission on Civil Rights.

Members of the public are entitled to submit written comments; the comments must be received in the regional office by Friday, September 16, 2011. Comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 624 9th Street, NW., Suite 740, Washington, DC 20425, faxed to (202) 376–7548, or e-mailed to *ero@usccr.gov*. Persons wishing to e-mail their comments, or to present their comments verbally at the meeting, or who desire additional information should contact contact Ivy L. Davis, Director, Eastern Regional Office, at (202) 376–7533 (or for hearing impaired TDD 800–877–8339). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

Records generated from this meeting may be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *http://www.usccr.gov*, or to contact the Eastern Regional Office at the above e-mail or street address.

The meeting will be conducted pursuant to the rules and regulations of the Commission and FACA.

Dated in Washington, DC, July 29, 2011.

Peter Minarik,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2011–19668 Filed 8–2–11; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Evaluation of State Coastal Management Programs and National Estuarine Research Reserves

AGENCY: Commerce, National Oceanic and Atmospheric Administration (NOAA), National Ocean Service, Office of Ocean and Coastal Resource Management.

ACTION: Notice of Intent to Evaluate and Notice of Availability of Final Findings.

SUMMARY: The NOAA Office of Ocean and Coastal Resource Management (OCRM) announces its intent to evaluate the performance of the North Carolina and Delaware Coastal Management Programs and the Delaware National Estuarine Research Reserve.

The Coastal Zone Management Program evaluations will be conducted pursuant to section 312 of the Coastal Zone Management Act of 1972, as amended (CZMA) and regulations at 15 CFR part 923, subpart L. The CZMA requires continuing review of the performance of states with respect to coastal program implementation. Evaluation of a Coastal Management Program requires findings concerning the extent to which a state has met the national objectives, adhered to its Coastal Management Program document approved by the Secretary of Commerce, and adhered to the terms of financial assistance awards funded under the CZMA.

The National Estuarine Research Reserve evaluation will be conducted pursuant to sections 312 and 315 of the CZMA and regulations at 15 CFR part 921, subpart E and part 923, subpart L. Evaluation of a National Estuarine Research Reserve requires findings concerning the extent to which a state has met the national objectives, adhered to its Reserve final management plan approved by the Secretary of Commerce, and adhered to the terms of financial assistance awards funded under the CZMA.

Each evaluation will include a site visit, consideration of public comments, and consultations with interested Federal, state, and local agencies and members of the public. A public meeting will be held as part of the site visit. When the evaluation is completed, OCRM will place a notice in the **Federal Register** announcing the availability of the Final Evaluation Findings. Notice is hereby given of the dates of the site visits for the listed evaluations and the dates, local times, and locations of the public meetings during the site visits.

DATES AND TIME: The North Carolina Coastal Management Program evaluation site visit will be held September 12–16, 2011. One public meeting will be held during the week. The public meeting will be held on Wednesday, September 14th, 2011, at 6:30 p.m. local time at the NOAA Beaufort Laboratory, NOAA/NCNERR Administration Building (Building 1), 101 Pivers Island Road, Beaufort, North Carolina.

The Delaware Coastal Management Program evaluation site visit will be held September 19–23, 2011. One public meeting will be held during the week. The public meeting will be held on Monday, September 19, 2011, at 6 p.m. local time at the Delaware Reserve, 818 Kitts Hummock Road, Dover, Delaware.

The Delaware National Estuarine Research Reserve evaluation site visit will be held September 19–23, 2011. One public meeting will be held during the week. The public meeting will be held on Monday, September 19, 2011, at 6 p.m. local time at the Delaware Reserve, 818 Kitts Hummock Road, Dover, Delaware.

ADDRESSES: Copies of the states' most recent performance reports, as well as OCRM's evaluation notification and supplemental information request letters to the state, are available upon request from OCRM. Written comments from interested parties regarding these programs are encouraged and will be accepted until 15 days after the public meeting held for the program. Please direct written comments to Kate Barba, Chief, National Policy and Evaluation Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, 10th Floor, N/ORM7, Silver Spring, Maryland 20910, or *Kate.Barba@noaa.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given of the availability of the final evaluation findings for the North Inlet/Winyah Bay (South Carolina) National Estuarine Research Reserve (NERR). Sections 312 and 315 of the Coastal Zone Management Act of 1972 (CZMA), as amended, require a continuing review of the performance of coastal states with respect to approval of CMPs and the operation and management of NERRs. The North Inlet/Winyah Bay NERR was found to be adhering to programmatic requirements of the NERR System.

Copies of these final evaluation findings may be obtained upon written request from: Kate Barba, Chief, National Policy and Evaluation Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, 10th Floor, N/ORM7, Silver Spring, Maryland 20910, or *Kate.Barbaa@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Kate Barba, Chief, National Policy and Evaluation Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, 10th Floor, N/ORM7, Silver Spring, Maryland 20910, (301) 563–1182, or *Kate.Barba@noaa.gov.*

Federal Domestic Assistance Catalog 11.419 Coastal Zone Management Program Administration.

Dated: July 19, 2011.

Donna Wieting,

Director, Office of Ocean and Coastal Resource Management National Ocean Service National Oceanic and Atmospheric Administration.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA534

Takes of Marine Mammals Incidental to Specified Activities; Seabird and Pinniped Research Activities in Central California, 2011–2012

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to PRBO Conservation Science (PRBO), to take marine mammals, by Level B harassment, incidental to conducting seabird and pinniped research activities on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore in central California.

DATES: Effective July 29, 2011, through July 28, 2012.

ADDRESSES: A copy of the authorization, application, and associated Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) may be obtained by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East West Highway, Silver Spring, MD 20910, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Jeannine Cody, Office of Protected Resources, NMFS (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(D) of the MMPA (16 U.S.C. 1371(a)(5)(D)) directs the Secretary of Commerce to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental taking of small numbers of marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and monitoring and reporting of such takings. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS' review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, NMFS must either issue or deny the authorization. NMFS must publish a notice in the **Federal Register** within 30 days of its determination to issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

NMFS received an application on January 10, 2011, from PRBO requesting the taking, by Level B harassment, of small numbers of marine mammals, incidental to conducting seabird and pinniped research activities on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore in central California (CA) for one year. PRBO, along with partners Oikonos Ecosystem Knowledge and Point Reyes National Seashore, plan to conduct the research activities for one year. NMFS reviewed PRBO's application and identified a number of issues requiring further clarification. After addressing comments from NMFS, PRBO modified its application and submitted a revised application on February 23, 2011. NMFS determined that application complete and adequate on April 18, 2011.

PRBO's research activities involve monitoring and censusing seabird colonies; observing seabird nesting habitat; restoring nesting burrows; observing breeding elephant seals, and resupplying a field station. The activities would occur in the vicinity of pinniped haul out sites located on Southeast Farallon Island (37°41′54.32″ N, 123° 0′8.33″ W), Año Nuevo Island (37° 6′29.25″ N, 122°20′12.20″ W), or within Point Reyes National Seashore (37°59′38.61″ N, 122°58′24.90″ W) in Central CA.

Acoustic and visual stimuli generated by: (1) Noise generated by motorboat approaches and departures; (2) noise generated during restoration activities and loading operations while resupplying the field station; and (3) human presence during seabird and pinniped research activities, may have the potential to cause California sea lions (*Zalophus californianus*), Pacific harbor seals (*Phoca vitulina*), northern elephant seals (*Mirounga angustirostris*), and Steller sea lions (*Eumetopias jubatus*) hauled out on Southeast Farallon Island, Año Nuevo Island, or Point Reyes National Seashore to flush into the surrounding water or to cause a short-term behavioral disturbance for marine mammals in the areas. These types of disturbances are the principal means of marine mammal taking associated with these activities and PRBO has requested an authorization to take 5,104 California sea lions, 526 harbor seals, 190 northern elephant seals, and 20 Steller sea lions by Level B harassment only.

Description of the Specified Geographic Region

The action area consists of the following three locations in the northeast Pacific Ocean:

South Farallon Islands

The South Farallon Islands (SFI) consist of Southeast Farallon Island (SEFI) located at 37°41′54.32″ N, 123°0′8.33″ W and West End Island (WEI). These two islands are directly adjacent to each other and separated by only a 30-foot (ft) (9.1 meter (m)) channel. The SFI have a land area of approximately 120 acres (0.49 square kilometers (km)) and are part of the Farallon National Wildlife Refuge. The islands are located near the edge of the continental shelf 28 miles (mi) (45.1 km) west of San Francisco, CA, and lie within the waters of the Gulf of the Farallones National Marine Sanctuary (NMS).

Año Nuevo Island

Año Nuevo Island (ANI) located at 37° 6′29.25″ N, 122°20′12.20″ W is one-quarter mile (402 m) offshore of Año Nuevo Point in San Mateo County, CA. This small 25-acre (0.1 square km) island is part of the Año Nuevo State Reserve, all of which is owned and operated by California State Parks. ANI lies within the Monterey Bay NMS and the newly established Año Nuevo State Marine Conservation Area.

Point Reyes National Seashore

Point Reyes National Seashore (PRNS) is located approximately 40 miles (64.3 km) north of San Francisco Bay and also lies within the Gulf of the Farallones NMS. The research areas (Life Boat Station, Drakes Beach, and Point Bonita) are within the headland coastal areas of the national park.

Description of the Specified Activity

PRBO will conduct seabird and pinniped research activities on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore from July 29, 2011 through July 28, 2012. To date, NMFS has issued three, 1-year IHAs to PRBO for the conduct of the same activities from 2007 to 2011, with the last expiring on Feb. 18, 2011.

Seabird Research on Southeast Farallon Island

PRBO proposes to conduct: (1) Daily observations of seabird colonies at a maximum frequency of three 15-minute (min) visits per day; and (2) conduct daily observations of breeding common murres (*Uria aalge*) at a maximum frequency of one 5-hour visit per day between July 2011 and July 2012. These activities usually involve one or two observers conducting daily censuses of seabirds or conducting mark/recapture studies of breeding seabirds on Southeast Farallon Island. The researchers plan to access the island's two landing areas, the North Landing and the East Landing, by 14 to 18 ft (4.3 to 5.5 m) open motorboats, which are hoisted onto the island using a derrick system and then travel by foot to coastal areas of the island to view breeding seabirds from behind an observation blind.

Field Station Resupply on Southeast Farallon Island

PRBO proposes to resupply the field station once every two weeks at a maximum frequency of 26 visits. Resupply activities involve personnel approaching either the North Landing or East Landing by motorboat. At East Landing—the primary landing site—all personnel assisting with the landing would stay on the loading platform approximately 30 ft (9.1 m) above the water. At North Landing, loading operations would occur at the water level in the intertidal areas.

Seabird Research on Año Nuevo Island

PRBO, in collaboration with Oikonos-Ecosystem Knowledge, proposes to monitor seabird burrow nesting habitat quality and to conduct habitat restoration at a maximum frequency of 20 visits per year. This activity involves two to three researchers accessing the north side of the island by a 12 ft (3.7 m) Zodiac boat. Once onshore, the researchers will check subterranean nest boxes and restore any nesting habitat for approximately 15 min.

Seabird Research on Point Reyes National Seashore

The National Park Service in collaboration with PRBO monitors seabird breeding and roosting colonies; conducts habitat restoration; removes non-native plants; monitors intertidal areas; maintains coastal dune habitat. Seabird monitoring usually involves one or two observers conducting the survey by small boats (12 to 22 ft; 3.6 to 6.7 m) along the Point Reyes National Seashore shoreline. Researchers would visit the site at a maximum frequency of 20 times

per year, with an emphasis on increasing monitoring during the nesting season. Researchers would conduct occasional, intermittent visits during the rest of the year.

Pinniped Research on West End Island

Pinniped research activities involve surveying breeding northern elephant seals on West End Island between early December and late February. At least three researchers would visit the site at a maximum frequency of five times per year. To conduct the census, the researchers would travel by foot approximately 1,500 ft (457.2 m) above the site to conduct the census.

NMFS outlined the purpose of the program in the Notice of Proposed IHA (76 FR 30311, May 25, 2011). The activities to be conducted have not changed between the Notice of Proposed IHA (76 FR 30311, May 25, 2011) and this final notice announcing the issuance of the IHA. For a more detailed description of the authorized action, including a discussion of associated acoustic and visual stimuli from the pinniped and seabird research, NMFS refers the reader to the Notice of Proposed IHA (76 FR 30311, May 25, 2011), the application, and associated documents referenced earlier in this document.

Comments and Responses

NMFS published a notice of receipt of the PRBO application and proposed IHA in the **Federal Register** on May 25, 2011 (76 FR 30311). During the 30-day public comment period, NMFS received no comments from the public and one letter from the Marine Mammal Commission (Commission), which recommended that NMFS issue the requested authorization provided that PRBO carry out the required mitigation measures and monitoring as described in the Notice of Proposed IHA (76 FR 30311, May 25, 2011). NMFS has included all measures proposed in the Notice of Proposed IHA (76 FR 30311, May 25, 2011) in the authorization.

Description of Marine Mammals in the Area of the Specified Activity

The marine mammals most likely to be harassed incidental to conducting seabird and pinniped research at the research areas on Southeast Farallon Island, Año Nuevo Island, or Point Reyes National Seashore are primarily California sea lions, northern elephant seals, Pacific harbor seals, and to a lesser extent the eastern distinct population of the Steller sea lion, which is listed as endangered under the U.S. Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*). California sea lions, northern elephant seals, and Pacific harbor seals are not listed as threatened or endangered under the ESA, nor are they categorized as depleted under the MMPA.

NMFS included a more detailed discussion of the status of these stocks and their occurrence at SEFI, ANI, and PRNS in the Notice of Proposed IHA (76 FR 30311, May 25, 2011).

Potential Effects on Marine Mammals

Acoustic and visual stimuli generated by: (1) Motorboat operations; and (2) the appearance of researchers may have the potential to cause Level B harassment of any pinnipeds hauled out on Southeast Farallon Island, Año Nuevo Island, or Point Reyes National Seashore. This disturbance from acoustic and visual stimuli is the principal means of marine mammal taking associated with these activities.

The effects of the pinniped and seabird research activities would be limited to short-term startle responses and localized behavioral changes and have the potential to temporarily displace the animals from a haulout site. NMFS would expect the pinnipeds to return to a haulout site within 60 min of the disturbance (Allen *et al.,* 1985) and does not expect that the pinnipeds would permanently abandon a haulout site during the conduct of pinniped and seabird research operations.

Finally, no research activities would occur on pinniped rookeries and breeding animals are concentrated in areas where researchers would not visit. Therefore, NMFS does not expect mother and pup separation or crushing of pups to occur.

For a more detailed discussion of behavioral reactions of marine mammals to loud noises or looming visual stimuli, and some specific observations of the response of marine mammals to this activity gathered during previous monitoring, NMFS refers the reader to the Notice of Proposed IHA (76 FR 30311, May 25, 2011), the application, and associated documents.

Anticipated Effects on Habitat

NMFS does not anticipate that the research operations would result in any temporary or permanent effects on the habitats used by the marine mammals in the research areas, including the food sources they use (*i.e.,* fish and invertebrates). NMFS does not anticipate that there would be any physical damage to any habitat. While NMFS anticipates that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification and human presence, this impact to habitat is temporary and reversible. See the Notice of Proposed IHA (76 FR 30311, May 25, 2011).

Mitigation

In order to issue an incidental take authorization (ITA) under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such species or stock for taking for certain subsistence uses.

PRBO has based the mitigation measures described herein, to be implemented for the seabird and pinniped research activities, on the following:

(1) Protocols used during previous PRBO seabird and pinniped research activities as approved by NMFS;

(2) Recommended best practices in Richardson *et al.* (1995);

(3) The Terms and Conditions of Scientific Research Permit 373–1868–00; and

(4) The Terms and Conditions listed in the Incidental Take Statement for NMFS' 2008 Biological Opinion for these activities.

To reduce the potential for disturbance from acoustic and visual stimuli associated with the activities, PRBO and/or its designees will implement the following mitigation measures for marine mammals:

(1) Abide by all of the Terms and Conditions listed in the Incidental Take Statement for NMFS' 2008 Biological Opinion, including: Monitoring for offshore predators and reporting on observed behaviors of Steller sea lions in relation to the disturbance.

(2) Abide by the Terms and Conditions of Scientific Research Permit 373–1868–00.

(3) Postpone beach landings on Año Nuevo Island until pinnipeds that may be present on the beach have slowly entered the water.

(4) Select a pathway of approach to research sites that minimizes the number of marine mammals harassed, with the first priority being avoiding the disturbance of Steller sea lions at haul-outs.

(5) Avoid visits to sites used by pinnipeds for pupping.

(6) Monitor for offshore predators and not approach hauled out Steller sea lions or other pinnipeds if great white sharks (*Carcharodon carcharias*) or killer whales (*Orcinas orca*) are seen in the area. If predators are seen, eastern U.S. stock Steller sea lions or any other

pinniped must not be disturbed until the area is free of predators.

(7) Keep voices hushed and bodies low to the ground in the visual presence of pinnipeds.

(8) Conduct seabird observations at North Landing on Southeast Farallon Island in an observation blind, shielded from the view of hauled out pinnipeds.

(9) Crawl slowly to access seabird nest boxes on Año Nuevo Island if pinnipeds are within view.

(10) Coordinate research visits to intertidal areas of Southeast Farallon Island (to reduce potential take) and to coordinate research goals for Año Nuevo Island to minimize the number of trips to the island.

(11) Coordinate monitoring schedules on Año Nuevo Island, so that areas near any pinnipeds would be accessed only once per visit.

(12) Have the lead biologist serve as an observer to evaluate incidental take.

NMFS has carefully evaluated the applicant's proposed mitigation measures and has considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (i) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (ii) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and (iii) the practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS or recommended by the public, NMFS has determined that the mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for IHAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

PRBO will sponsor a marine mammal monitor during the present research project, in order to implement the mitigation measures thus satisfying the monitoring requirements of the IHA. PRBO's monitoring activities will consist of monitoring the area for pinnipeds during all research activities and conducting and recording observations on pinnipeds within the vicinity of the research areas. The monitoring notes would provide dates, location, species, the researcher's activity, behavioral state, numbers of animals that were alert or moved greater than one meter, and numbers of pinnipeds that flushed into the water.

Reporting

The PRBO will submit a final monitoring report to the NMFS Director of Office of Protected Resources no later than 90 days after the expiration of the IHA. The final report will describe the operations that were conducted and sightings of marine mammals near the project. The report will provide full documentation of methods, results, and interpretation pertaining to all monitoring. The final report will provide:

(i) A summary and table of the dates, times, and weather during all seabird and pinniped research activities.

(ii) Species, number, location, and behavior of any marine mammals, observed throughout all monitoring activities.

(iii) An estimate of the number (by species) of marine mammals that are known to have been exposed to acoustic or visual stimuli associated with the seabird and pinniped research activities.

(iv) A description of the implementation and effectiveness of the monitoring and mitigation measures of the IHA and full documentation of methods, results, and interpretation pertaining to all monitoring.

In the unanticipated event that PRBO's activities cause any taking of a marine mammal in a manner prohibited by the IHA, such as an injury (Level A harassment), serious injury or mortality (*e.g.,* vessel-strike), PRBO shall immediately cease the specified activities and immediately report the incident to the Chief of the Permits, Conservation, and Education Division, Office of Protected Resources, NMFS, at 301–427–8401 and/or by e-mail to *Michael.Payne@noaa.gov* and *Jeannine.Cody@noaa.gov*, and the Southwest Regional Stranding Coordinators (*Joe.Cordaro@noaa.gov* and *Sarah.Wilkin@noaa.gov*). The report must include the following information: (a) Time, date, and location (latitude/longitude) of the incident; the name and type of vessel involved; the vessel's speed during and leading up to the incident; description of the incident; water depth; environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility); description of marine mammal observations in the 24 hours preceding the incident; species identification or description of the animal(s) involved; the fate of the animal(s); and photographs or video footage of the animal (if equipment is available).

PRBO shall not resume its activities until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with PRBO to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. PRBO may not resume their activities until notified by NMFS in writing via a letter or e-mail or via the telephone.

In the event that PRBO discovers an injured or dead marine mammal, and the lead researcher determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), PRBO will immediately report the incident to the Chief of the Permits, Conservation, and Education Division, Office of Protected Resources, NMFS, at 301–427–8401 and/or by e-mail to *Michael.Payne@noaa.gov* and *Jeannine.Cody@noaa.gov*, and the Southwest Regional Stranding Coordinators (*Joe.Cordaro@noaa.gov* and *Sarah.Wilkin@noaa.gov*). The report must include the same information required above for unauthorized takings. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with PRBO to determine whether modifications in the activities are appropriate.

In the event that PRBO discovers an injured or dead marine mammal, and the lead researcher determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), PRBO will report the incident to the Chief of the Permits, Conservation, and Education Division, Office of Protected Resources, NMFS, at 301–427–8401 and/or by e-mail to *Michael.Payne@noaa.gov* and *Jeannine.Cody@noaa.gov*, and the Southwest Regional Stranding Coordinators (*Joe.Cordaro@noaa.gov*

and *Sarah.Wilkin@noaa.gov*) within 24 hours of the discovery. PRBO will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

NMFS anticipates take by Level B harassment only as a result of the pinniped and research operations on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore. Based on PRBO's previous research experiences, with the same activities conducted in the research areas, NMFS estimates that small numbers of California sea lions, Pacific harbor seals, northern elephant seals, and Steller sea lions could be potentially affected by Level B behavioral harassment over the course of the IHA.

For this IHA, NMFS has authorized the take of 5,104 California sea lions, 526 harbor seals, 190 northern elephant seals, and 20 Steller sea lions. Because of the required mitigation measures and the likelihood that some pinnipeds will avoid the areas, NMFS expects no injury, serious injury, or mortality to occur, and no takes by injury or mortality are authorized.

Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

In making a negligible impact determination, NMFS considers:

(1) The number of anticipated mortalities;

(2) The number and nature of anticipated injuries;

(3) The number, nature, and intensity, and duration of Level B harassment; and

(4) The context in which the takes occur.

As mentioned previously, NMFS estimates that four species of marine mammals could be potentially affected by Level B harassment over the course of the IHA. For each species, these numbers are small (each, less than or equal to two percent) relative to the population size.

NMFS does not anticipate takes by Level A harassment, serious injury, or mortality to occur as a result of PRBO's research activities, and none are authorized. These species may exhibit behavioral modifications, including temporarily vacating the area during the seabird and pinniped research activities to avoid the resultant acoustic and visual disturbances. However, NMFS anticipates only short-term behavioral disturbance to occur due to the brief duration of the research activities, the availability of alternate areas for marine mammals to avoid the resultant acoustic and visual disturbances, and limited access of PRBO researchers to Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore during the pupping season. Due to the nature, degree, and context of the behavioral harassment anticipated, NMFS does not expect these activities to impact rates of recruitment or survival.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that the impact of conducting seabird and pinniped research activities on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore in central California, July 29, 2011 through July 28, 2012, will result in the incidental take of small numbers of marine mammals, by Level B behavioral harassment only, and that the total taking from PRBO's activities would have a negligible impact on the affected species or stocks; and that impacts to affected species or stocks of marine mammals would be mitigated to the lowest level practicable.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

The Steller sea lion, eastern U.S. stock is listed as threatened under the ESA and occurs in the research area. NMFS Headquarters' Office of Protected Resources, Permits, Conservation, and Education Division conducted a formal section 7 consultation under the ESA. On November 18, 2008, NMFS issued a Biological Opinion (2008 BiOp); concluded that the issuance of an IHA is likely to affect, but not likely to jeopardize the continued existence of Steller sea lions; and issued an incidental take statement (ITS) for Steller sea lions pursuant to section 7 of the ESA. The ITS contains reasonable and prudent measures for implementing terms and conditions to minimize the effects of this take. NMFS has reviewed the 2008 BiOp and determined that there is no new information regarding effects to Steller sea lions; the action has not been modified in a manner which would cause adverse effects not previously evaluated; there has been no new listing of species or no new designation of critical habitat that could be affected by the action; and the action will not exceed the extent or amount of incidental take authorized in the 2008 BiOp. Therefore, the IHA does not require the reinitiation of Section 7 consultation under the ESA.

National Environmental Policy Act (NEPA)

To meet NMFS' NEPA requirements for the issuance of an IHA to PRBO, NMFS prepared an Environmental Assessment (EA) in 2007 that was specific to seabird research activities on SEFI, WEI, ANI, and PRNS and evaluated the impacts on the human environment of NMFS' authorization of incidental Level B harassment resulting from seabird research in Central California. At that time, NMFS determined that conducting the seabird research would not have a significant impact on the quality of the human environment and issued a Finding of No Significant Impact (FONSI) and, therefore, it was not necessary to prepare an environmental impact statement for the issuance of an IHA to PRBO for this activity. In 2008, NMFS prepared a supplemental EA (SEA) titled ''Supplemental Environmental Assessment for the issuance of an Incidental Harassment Authorization To Take Marine Mammals by Harassment Incidental to Conducting Seabird And Pinniped Research in Central California And Environmental Assessment For The Continuation of Scientific Research on Pinnipeds in California Under Scientific Research Permit 373–1868–00,'' to

address new available information regarding the effects of PRBO's seabird and pinniped research activities that may have cumulative impacts to the physical and biological environment. At that time, NMFS concluded that issuance of an IHA for the December 2008 through 2009 season would not significantly affect the quality of the human environment and issued a FONSI for the 2008 SEA regarding PRBO's activities. In conjunction with this year's application, NMFS has again reviewed the 2007 EA and the 2008 SEA and determined that there are no new direct, indirect or cumulative impacts to the human and natural environment associated with the IHA requiring evaluation in a supplemental EA and NMFS, therefore, reaffirms the 2008 FONSI. A copy of the EA, SEA, and the NMFS FONSI for this activity is available upon request (see **ADDRESSES**).

Authorization

As a result of these determinations, NMFS has issued an IHA to PRBO to take marine mammals, by Level B harassment only, incidental to conducting seabird and pinniped research activities on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore in central California provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: July 29, 2011.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA396

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Shallow Hazards Survey in the Chukchi Sea, Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of an incidental take authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to Statoil USA E&P Inc. (Statoil) to take, by harassment, small numbers of 13 species of marine mammals incidental to shallow hazards and geotechnical surveys in the Chukchi Sea, Alaska, during the 2011 Arctic open-water season.

DATES: Effective August 1, 2011, through November 30, 2011.

ADDRESSES: Inquiry for information on the incidental take authorization should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. A copy of the application containing a list of the references used in this document, NMFS' 2010 Environmental Assessment (EA), 2011 Supplemental Environmental Assessment (SEA), Finding of No Significant Impact (FONSI), and the IHA may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 427–8401 or Brad Smith, NMFS, Alaska Region, (907) 271–3023.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as:

> An impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

NMFS received an application on March 1, 2011, from Statoil for the taking, by harassment, of marine mammals incidental to shallow hazards site surveys and soil investigations (geotechnical boreholes) in the Chukchi Sea, Alaska, during the 2011 open-water season. After addressing comments from NMFS, Statoil modified its application and submitted a revised application on April 19, 2011. The April 19, 2011, application was the one available for public comment (see **ADDRESSES**) and considered by NMFS for the IHA.

The shallow hazards and site clearance surveys would use a towed airgun cluster consisting of four, 10-in^3 airguns with a ~600 m (1,969 ft) towed hydrophone streamer, as well as additional lower-powered and higher frequency survey equipment for collecting bathymetric and shallow sub-bottom data. The proposed survey will take place on and near Statoil's leases in the Chukchi Sea, covering a total area of ~665 km^2 located ~240 km (150 mi) west of Barrow and ~165 km (103 mi) northwest of Wainwright, in water depths of ~30–50 m (100–165 ft).

The geotechnical soil investigations will take place at prospective drilling locations on Statoil's leases and leases jointly owned with ConocoPhillips Alaska Inc. (CPAI). All cores will be either 5.3 cm or 7.1 cm (2.1 in. or 2.8 in.) in diameter (depending on soil

type), and those collected at prospective drilling locations will be up to 100 m (328 ft) in depth. The maximum total number of samples collected as part of the drilling location and site survey program will be ~29.

Statoil intends to conduct these marine surveys during the 2011 Arctic open-water season (July through November). Impacts to marine mammals may occur from noise produced from active acoustic sources (including airguns) used in the surveys.

Description of the Specified Activity

Statoil acquired 16 leases in the Chukchi Sea during Lease Sale 193 held in February 2008. The leased areas are located ~240 km (150 mi) west of Barrow and ~160 km (~100 mi) northwest of Wainwright. During the open-water season of 2010, Statoil conducted a 3D seismic survey over its lease holdings and the surrounding area. The data gathered during that survey are currently being analyzed in order to determine potential well locations on the leases. These analyses will be completed prior to commencement of the site survey program. During the open-water season of 2011, Statoil proposes to conduct shallow hazards and site clearance surveys (site surveys) and soil investigations (geotechnical boreholes).

The operations will be performed from two different vessels. Shallow hazards surveys will be conducted from the M/V DUKE, while geotechnical soil investigations will be conducted from the M/V FUGRO SYNERGY (see Statoil's application for vessel specifications). Both vessels will mobilize from Dutch Harbor in late July and arrive in the Chukchi Sea to begin work on or after August 1. Allowing for poor weather days, operations are expected to continue into late September or early October. However, if weather permits and all planned activities have not been completed, operations may continue as late as November 15.

The site survey work on Statoil's leases will require approximately 23 days to complete. Geotechnical soil investigations on Statoil leases and on leases jointly held with CPAI will require ~14 days of operations.

Shallow Hazards and Site Clearance Surveys

Shallow hazards site surveys are designed to collect bathymetric and shallow sub-seafloor data that allow the evaluation of potential shallow faults, gas zones, and archeological features at prospective exploration drilling locations, as required by the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE). Data are typically collected using multiple types of acoustic equipment. During the site surveys, Statoil proposes to use the following acoustic sources: 4×10 in^3 airgun cluster, single 10 in^3 airgun, Kongsberg SBP3000 sub-bottom profiler, GeoAcoustics 160D side-scan sonar, and a Kongsberg EM2040 multi-beam echosounder. The acoustic characteristics (including operating frequencies and estimated source levels) of all active sources are described in the **Federal Register** notice for the proposed IHA (76 FR 30110; May 24, 2011). That information has not changed and is therefore not repeated here.

Geotechnical Soil Investigations

Geotechnical soil investigations are performed to collect detailed data on seafloor sediments and geological structure to a maximum depth of 100 m (328 ft). These data are then evaluated to help determine the suitability of the site as a drilling location. Statoil has contracted with Fugro who will use the vessel M/V FUGRO SYNERGY to complete the planned soil investigations. Three to four bore holes will be collected at each of up to 5 prospective drilling locations on Statoil's leases, and up to 3 boreholes may be completed at each of up to 3 potential drilling locations on leases jointly owned with CPAI. This would result in a maximum total of 29 bore holes to be completed as part of the geotechnical soil investigation program. The FUGRO SYNERGY operates a Kongsberg EA600 Echosounder and uses a Kongsberg 500 high precision acoustic positioning (HiPAP) system for precise vessel positioning while completing the boreholes. The acoustic characteristics (including operating frequencies and estimated source levels) of all active sources, as well as the sounds produced during soil investigation sampling, are described in the **Federal Register** notice for the proposed IHA (76 FR 30110; May 24, 2011). That information has not changed and is therefore not repeated here.

Comments and Responses

A notice of NMFS' proposal to issue an IHA to Statoil published in the **Federal Register** on May 24, 2011 (76 FR 30110). That notice described, in detail, Statoil's proposed activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals and the availability of marine mammals for subsistence uses. During the 30-day public comment period, NMFS received three comment letters from the following: The Marine Mammal Commission (Commission); the Alaska Eskimo Whaling Commission (AEWC); and Alaska Wilderness League (AWL), Center for Biological Diversity, Defenders of Wildlife, Earthjustice, Natural Resources Defense Council, Oceana, Pacific Environment, and Sierra Club (collectively ''AWL''). The AEWC submitted a copy of the 2011 Conflict Avoidance Agreement (CAA), since Statoil declined to sign the CAA.

Any comments specific to Statoil's application that address the statutory and regulatory requirements or findings NMFS must make to issue an IHA are addressed in this section of the **Federal Register** notice.

MMPA Concerns

Comment 1: AEWC states that Statoil's IHA application NMFS released is incomplete because it did not contain a copy of the Plan of Cooperation (POC). AEWC points out that Statoil stated that it ''is developing a Plan of Cooperation (POC) for their proposed 2011 activities.'' (Statoil IHA Application at page 51), and since Statoil did not provide the POC or any detail on the measures to be adopted in compliance with 50 CFR 216.104(a)(12)(iii), NMFS cannot make the determination required under the MMPA. AEWC further points out that NMFS has previously stated that ''[i]t should be understood that the POC is required by NMFS's implementing regulations to be submitted as part of the industry's IHA application'' (74 FR 55368, 55393; October 27, 2009). AEWC requests that NMFS enforce the requirement that Statoil set forth, in its application, the proposed measures employed to prevent conflicts with subsistence activities.

Response: Although NMFS agrees with AEWC's statement that a POC is essential for making the determination for granting an IHA to the industry, it is not used to determine the completeness of an IHA application. A complete IHA application should address all fourteen questions in NMFS' marine mammal incidental take application guidelines, which can be found at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#apply.* Concerning the POC, as stated in item 12 of the application guideline, the applicant ''must submit either a 'plan of cooperation' or information that identifies what measures have been taken and/or will be taken to minimize any adverse effects on the availability of marine mammals for subsistence uses.'' In the case of Statoil's IHA application, NMFS believes that the company provided detailed information that identified what measures have been

taken and will be taken to minimize any adverse effects to subsistence harvesting of marine mammals, such as maintaining an open and transparent process with all stakeholders throughout the duration of its activities in the Chukchi Sea, identifying transit routes and timing to avoid other subsistence use areas and communicating with coastal communities before operating in or passing through these areas. In addition, Statoil completed the early phase of the POC process for the proposed project by meeting with the North Slope Borough Department of Wildlife Management (December 2010) and the AEWC (mini-convention in Barrow, February 2011), and arranged to visit and hold public meetings in the affected Chukchi Sea villages, including Pt. Hope, Pt. Lay, Wainwright, and Barrow during the week of March 21, 2011. NMFS determined that these activities showed that Statoil was in the process of finalizing its POC with the Native communities, therefore NMFS determined that Statoil's application was complete. Subsequently on June 20, 2011, NMFS received a draft POC with detailed information on the POC process. On July 14, 2011, NMFS received the final POC from Statoil.

Impacts to Marine Mammals

Comment 2: AWL states that NMFS's uniform marine mammal harassment threshold for impulsive sounds does not take into account the documented reactions of specific species found in the Arctic to much lower received levels. The AWL argues by providing an example that harbor porpoises have been shown to be exceptionally sensitive to noise, and NMFS has used 120 dB as the appropriate threshold when authorizing marine mammal take for Navy sonar activities. In addition, the AWL states, by referring to Southall *et al.* (2007), that ''a 2007 study found that for migrating bowheads 'the onset of significant behavioral disturbance from multiple pulses occurred at [received levels] around 120 dB re: 1 μPa[.]' ''. The AWL concludes that ''the 2007 study in fact determined that the reactions of migrating bowhead whales to sounds as low as 120 dB had a 'higher potential' for affecting foraging, reproduction, or survival rates.''

Response: NMFS does not agree with AWL's assessment on acoustic effects of marine mammals. The 120 dB threshold for the onset of behavioral harassment for harbor porpoise by Navy sonar activities is limited to exposure to mid- and high-frequency sonar signals, which are defined as sound with dominant frequency at 1–10 kHz and above 10 kHz, respectively. This is because harbor porpoise is considered a ''high frequency cetacean'' (Southall *et al.* 2007), and, therefore, is more sensitive to noise exposure at higher frequency spectra. Sounds produced during marine seismic surveys have most of their energy concentrated at the lower end of the frequency spectra, which is largely outside of the harbor porpoises' hearing threshold (Andersen 1970; Kastelein *et al.* 2002). Therefore, NMFS believes that it is scientifically justifiable to use received level at 120 dB as the threshold for behavioral harassment for harbor porpoises exposed to mid- and high-frequency Navy sonar, but it is not appropriate to use this received level as the threshold for behavioral harassment when exposed to seismic sounds.

Regarding its comment on bowhead disturbances when exposed to seismic sound at received level of 120 dB, AWL incorrectly cited the reference in Southall *et al.* (2007) as ''a 2007 study.'' In fact, the reference in Southall *et al.* (2007) that AWL refers to was a conference abstract presented at the 1999 Meeting of the Acoustical Society of America by Richardson *et al.* (1999) titled ''Displacement of Migrating Bowhead Whales by Sounds from Seismic Surveys in Shallow Waters of the Beaufort Sea.'' The study was conducted in the summer months between 1996 and 1998 in shallow waters of the Beaufort Sea, Alaska, during seismic surveys with 6–16 airguns and total volumes of 560–1,500 in^3. As stated in the abstract, ''[w]estward autumn migration of bowhead whales near and offshore of the exploration area was monitored by aerial surveys flown daily, weather permitting, during the three seasons. Aerial survey data from days with and without airgun operations were compared.'' The authors observed that ''[m]ost bowheads avoided the area within 20 km of the operating airguns; bowheads were common there on days without airgun operations.'' In addition, the authors stated that bowhead whale ''sighting rates just beyond the avoidance zone were higher on days with airgun operations. Broadband received levels of airgun pulses at 20 km were typically 120–130 dB re: 1 μPa (rms over pulse duration).'' Based on this description, NMFS concludes that the displacement of bowhead whales by seismic surveys constitutes temporary avoidance behavior during ''days with airgun operations,'' and these whales seem to avoid an area where received levels were about 120–130 dB. The authors did not state that they observed ''significant behavioral disturbance,'' nor did they report a disruption of behavioral patterns, either of which could be an indication of Level B harassment.

In addition, these minor course changes occurred during migration and have not been seen at other times of the year and during other activities. Therefore, NMFS does not believe that minor course corrections during a migration equate to ''take'' under the MMPA. This conclusion is based on controlled exposure experiments conducted on migrating gray whales exposed to the U.S. Navy's low frequency sonar (LFA) sources (Tyack 2009). When the source was placed in the middle of the migratory corridor, the whales were observed deflecting around the source during their migration. However, such minor deflection is considered not to be biologically significant. To show the contextual nature of this minor behavioral modification, recent monitoring studies of Canadian seismic operations indicate that when, not migrating, but involved in feeding, bowhead whales do not move away from a noise source at an SPL of 160 dB. Therefore, while bowheads may avoid an area of 20 km (12.4 mi) around a noise source, when that determination requires a post-survey computer analysis to find that bowheads have made a 1 or 2 degree course change, NMFS believes that does not rise to the level of a ''take.'' NMFS therefore continues to estimate ''takings'' under the MMPA from impulse noises, such as seismic, as being at a distance of 160 dB (re 1 μPa) from the source. Although it is possible that marine mammals could react to any sound levels detectable above the ambient noise level within the animals' respective frequency response range, this does not mean that such animals would react in a biologically significant way.

Therefore, unless and until an improved approach is developed and peer-reviewed, NMFS will continue to use the 160–dB threshold for determining the level of take of marine mammals by Level B harassment for impulse noise (such as from airguns).

Comment 3: In reference to the impact analysis NMFS provided in the **Federal Register** notice for the proposed IHA (76 FR 30110; May 24, 2011), AWL states that the existing science does not support strictly distinguishing impulse and non-impulse noise, and that NMFS recognizes that over long distances (tens of kilometers), impulse sounds can become ''stretched'' out. Further, AWL refers to the peer-review panel report for this year's Open Water Meeting noting

that phenomenon and concluding that sounds from airguns ''should not be treated as truly impulsive when received at ranges where sound propagation is known to remove the impulsive nature of these signals.'' AWL concludes that ''a uniform 160–dB harassment threshold is not justified by either the science or the standards imposed by the MMPA. And, without an appropriate threshold, NMFS cannot begin to accurately gauge the extent of marine mammal take from Statoil's operations.''

Response: Although NMFS agrees with AWL that at long distances an impulse acoustic signal will lose its pulse feature by stretching its duration due to multipath propagation, these signals (or noises) are still fundamentally different from other non-impulse noise sources such as those from vibratory pile driving, drilling, and dredging based on the following characteristics:

First, the elongated pulse signals from the airgun array at far distances are caused by multipath propagation in a reverberant environment (Greene and Richardson 1988; Richardson *et al.* 1995; Madsen *et al.* 2002; Lurton 2002), which is different from other non-pulse signals at closer distances, which is composed of mostly direct sound. The reverberation part of the sound in the ocean behaves differently compared to the direct sound and early surface and bottom reflections from the perspective of the receiver. The direct sound and early reflections follow the inverse square law, with the addition of absorption effects in the case of early reflections, and so their amplitude varies with distance. However the reverberant part of the sound remains relatively constant up to a large distance with the position of the receiver. Therefore, as distance increases from the source, the component of reverberant sounds increases against the direct sound. In addition, the reverberant energy is less directional and is distributed more uniformly around the ambient environment of the animal. As shown in human psychoacoustics, these characteristics in a reverberant field provide distance cues to the listener as to how far away the source is located (Howard and Angus 2006). Therefore, at a distance where the airgun signals have been ''stretched'' to non-pulse, the receiving animals would be able to correctly perceive that these sounds are coming from far away, and would thus be less likely to be affected behaviorally as behavior responses are not solely dependent on received levels. Other factors such as distance to the source, movement of the source, source characteristics, and the receiver's (*i.e.,* animal's) age, sex, motivation states, and prior experience, etc. probably play more significant roles in determining the responses of the animals that are being exposed to lower levels of noises than solely the received sound level.

Second, even though during horizontal propagation, the initial short pulse could be ''stretched'' from milliseconds when emitted to about 0.25–0.5 second long at a few kilometers in shallow water (Richardson *et al.* 1995), the noise duration is still very short when compared to those ''conventional'' non-pulse noise sources (vibratory pile driving, drilling, and dredging, etc.) for which NMFS applies a 120 dB threshold for assessing behavioral harassment. The empirical measurements of a 3,000 in^3 airgun array received signal characteristics showed that its pulse duration was stretched to 0.2 second at approximately 1.3 km (0.8 mi), to 0.5 second at approximately 10 km (6.2 mi), and to about 1.8 seconds at 80 km (50 mi) from the source (O'Neill *et al.* 2011). Based on the airgun array's firing rate of 0.1 Hz (1 shot every 10 seconds), the duty cycle was only 18% for the signal at 80 km (50 mi) (1.8 seconds on for every 10 seconds). Conversely, the ''conventional'' non-pulse noises from vibratory pile driving, drilling, and dredging typically last much longer (minutes to hours) with very brief (seconds for vibratory pile driving) intervals.

Therefore, NMFS does not agree that it is appropriate to treat elongated airgun pulses at long distances as a ''conventional'' non-pulse signal and apply the 120 dB behavioral response threshold to that sound source.

Comment 4: AWL states that NMFS' approach to determining take for Statoil's surveying during the bowhead fall migration is not supportable because the proposed authorization does not adequately take into account that Statoil's fall surveying will take place within a migratory corridor. AWL argues that ''by relying on density without sufficiently considering the overlap of ensonified areas, it assumes that migratory animals remain relatively stationary from one day to the next, despite Statoil's operations exposing the same areas of the ocean to elevated sound level at very different times, days or even weeks apart.'' AWL further states that ''NMFS' calculations are premised on the notion that a bowhead whale exposed, for example, on day 15 during the course of the survey remains stationary and is the same whale exposed when the vessel travels near the area again on day 23 during the detailed survey, amounting to only a single harassed whale. Such a result does not reflect the reality of whales moving through the surveying area on their way to wintering grounds in the Bering Sea.'' AWL points out that ''in the past, NMFS has avoided this problem by calculating the ensonified area based on the amount of linear surveying line, rather than by extending the boundaries of the area to be surveyed.''

Response: NMFS does not agree with AWL's statement that our take estimates for bowhead whales during Statoil's shallow hazards survey in the Chukchi Sea are ''not supportable.'' First, evidence has shown that the bowhead whale fall migratory route through the Chukchi Sea is more spread out than in the Beaufort Sea, where whales tend to have a more confined migratory corridor due to ice conditions. In a recent satellite tagging study, Quakenbush *et al.* (2010) concluded from GPS data that bowhead whales do not spend much time in the north-central Chukchi Sea, near Statoil's 2011 proposed shallow hazards survey. Kernel densities from the study showed that areas with the highest probability of bowhead use from September to December were near Point Barrow and the northeast Chukotka coast; the area along the east coast of Wrangel Island also had a moderate probability of use (Quakenbush *et al.* 2010). In addition, movements and behavior of tagged bowhead whales in this study indicated that the greatest potential for disturbance from industrial activities is near Point Barrow in September and October and in the lease area in September. Lastly, Statoil's shallow hazards survey is scheduled to begin on August 1, 2011, and would require approximately 23 days to complete. Therefore, there is the potential for Statoil to complete their entire operation prior to the time when bowhead whales typically begin entering the Chukchi Sea in the fall (*i.e.*, mid-September). Thus NMFS determined that the marine mammal density data provided in Statoil's IHA application for this period are overestimated. And to compensate for the overestimation due to the lower than actual density, NMFS opted not to consider overlaps of the ensonified area.

Additionally, it should be noted that this is not the first time that this approach has been used in estimating takes from shallow hazards and 3D seismic surveys. When airgun activity, as part of a shallow hazards survey is ongoing continuously after ramping up, it is expected that nearly all bowhead whales would avoid the areas ensonified to >160 dB. This would

mean that migrating whales passing through the region would likely avoid the immediate area around the activities, and thus not be ''taken'' repeatedly by exposure to sounds >160 dB.

Alternatively, bowhead take numbers can be calculated based on the migratory animals' daily average multiplied by the duration in days when seismic activities are ongoing, as was typically done to estimate bowhead whale takes in the Beaufort Sea during their migration. However, no such data are available for migratory bowheads in the Chukchi Sea, therefore, this method cannot be applied.

Regarding the method NMFS used to estimate the take by calculating the ensonified area based on the amount of linear surveying line, rather than by extending the boundaries of the area to be surveyed, this method is used for 2D seismic surveys where there is no overlapping ensonified area. Using this methodology to calculate for overlapping ensonified area would result in an unrealistically large area (in some cases, it could be larger than the entire Chukchi Sea) being treated as the affected area, which NMFS does not think is appropriate.

Comment 5: AWL states that NMFS must include the effects from all of Statoil's equipment, not only the noise from the airguns (surveying) and ship thrusters (drilling). AWL points out that this year's peer-review panel found that Statoil's other acoustic sources are ''relatively powerful and operate in the acoustic band of many if not most marine mammals.'' AWL further states that although NMFS has proposed that Statoil conduct field measurements for all its equipment in order to determine whether additional safety zones are required, this cannot cure the failure to accurately determine in advance the number of marine mammals that may be harassed by Statoil's activities. AWL states that NMFS should further consider the fact that Statoil's two exploratory activities (surveying and drilling) may take place in close proximity to one another, each using a variety of noise-producing equipment that could contribute to adverse synergistic effects.

Response: NMFS agrees with AWL that all of Statoil's active acoustic equipment must be included and analyzed for their potential effects on marine mammals. In its **Federal Register** notice of proposed IHA (76 FR 30110; May 24, 2011) and the SEA, NMFS provided a detailed description and analysis of these active acoustic sources. A list of these sources with their frequency bandwidth and modeled/known maximum source level are provided in Table 1–3 of the SEA. These sources include the Kongsberg EA600 echosounder, GeoAcoustics 160D side-scan sonar, Kongsberg SBP300 sub-bottom profiler, Kongsberg EM2040 multibeam echosounder, and Kongsberg HiPAP 500. All these active sources are expected to have maximum source levels below those of the airgun array except the GeoAcoustics 160D side-scan sonar, of which the maximum source level is approximately 233 dB re 1 μPa @ 1m. However, since this equipment operates at frequencies of 114 and 410 kHz, the modeled isopleths drop down to 160 dB at about 453 and 108 m (1,486 and 354 ft) from the source, and to 120 dB at about 1,177 and 221 m (3,861.5 and 725 ft) from the source for each of these two frequencies, respectively, when high-frequency absorption is taken into consideration. These distances are well within the modeled 160 dB and 120 dB zones for the airgun array, which is at 2,250 m and 39,000 m (1.4 mi and 24 mi) for received levels of 160 and 120 dB, respectively. Therefore, the acoustic footprints from all other active sources are contained within that of the airgun array, and no additional take from these sources is expected.

Nevertheless, as mentioned by AWL and described in detail in the proposed IHA (76 FR 30110; May 24, 2011), Statoil will be required to conduct sound source verification (SSV) tests for all acoustic equipment used during the proposed shallow hazards survey. The empirical measurements will further show the presence or absence of low-frequency side-lobes and will be used to refine the exclusion zones, which are required for implementing monitoring and mitigation measures, as needed.

NMFS is aware of the relative locations of Statoil's two exploratory activities (shallow hazards survey and geotechnical survey) and has conducted appropriate analyses concerning sources and impacts from both activities. These analyses are described in detail in the proposed IHA (76 FR 30110; May 24, 2011) and the SEA. Please refer to those documents for that discussion.

Mitigation Measures

Comment 6: AWL states that ''NMFS should consider a safety zone specific to cow-calf pairs'' to provide additional protective measures to address uncertainties regarding impacts on ''bowhead cow-calf pairs and aggregations of whales.''

Response: Although it has been suggested that female baleen whales with calves ''show a heightened response to noise and disturbance,'' there is no evidence that such ''heightened response'' is biologically significant and constitutes a ''take'' under the MMPA. Nevertheless, in the past NMFS has required a 120-dB safety zone for migrating bowhead cow/calf pairs to be implemented (see **Federal Register** notice for proposed IHA to Shell; 75 FR 22708; May 18, 2010). However, in the Chukchi Sea, the migratory corridor for bowhead whales is wider and more open, thus the 120-dB ensonified zone would not impede bowhead whale migration. The animals would be able to swim around the ensonified area. Additionally, NMFS has not imposed a requirement to conduct aerial monitoring of the 120-dB safety zone for the occurrence of four or more cow-calf pairs in the Chukchi Sea because it is not practicable. Especially for Statoil's proposed shallow hazards survey, NMFS determined that monitoring the 120-dB zone of influence was not necessary in the Chukchi Sea because there would not be the level of effort by these surveys (*i.e.*, a small 120-dB zone of about 39,000 m radius). This provides cow/calf pairs with sufficient ability to move around the seismic source without significant effort.

Monitoring Measures

Comment 7: The Commission recommends that prior to granting the requested authorization, NMFS provide additional justification for its preliminary determination that the proposed monitoring program will be sufficient to detect, with a high level of confidence, all marine mammals within or entering the identified Level B harassment zones.

Response: For this action, marine mammal monitoring serves two primary purposes. One purpose (referred to as mitigation monitoring) is to trigger mitigation measures—so that when a marine mammal is sighted within or entering the identified 180 or 190-dB exclusion zones, appropriate measures (speed/course change, power-down, or shutdown of sound sources) can be implemented, thus minimizing the likelihood that marine mammals are exposed to sound levels that have been associated with injurious effects. The other purpose is to collect data regarding the behavior and numbers of marine mammals detected within the larger 160-dB zone, which can be used both to refine Level B take estimates and to add to our understanding of the nature and scale of marine mammal behavioral responses to this activity. In the **Federal Register** notice for the proposed IHA (76 FR 30110; May 24, 2011), NMFS provided a thorough analysis of the proposed monitoring

measures and made a preliminary determination, based on the modality that is proposed to be utilized for monitoring, prior years' marine mammal visual monitoring measures as reported in the 90-day reports and comprehensive reports for seismic surveys in the Arctic, and the small exclusion zones (50 m [164 ft] from the source to where received levels would be at 190 dB and above, and 190 m [623 ft] from the source to where received levels would be at 180 dB and above) anticipated during the proposed Statoil shallow hazards surveys. The analysis led NMFS to conclude that the proposed monitoring program will be sufficient to detect, with a high level of confidence, nearly all marine mammals within or entering the identified 180 and 190 dB exclusion zone to implement mitigation measures to prevent Level A harassment (injury).

The identified Level B harassment zone for Statoil's proposed shallow hazards survey is modeled at 2,250 m (1.4 mi) from the source. This distance is believed to be within reasonable range for visual detection based on prior years' marine mammal monitoring during seismic surveys in the Arctic (Aerts *et al.* 2008; Hauser *et al.* 2008; Brueggeman 2009; Ireland *et al.* 2009; Reiser *et al.* 2010; 2011; Blees *et al.* 2011). In addition, NMFS worked with Statoil on the implementation of recommendations from the independent peer-review panel of Statoil's monitoring plan and included a list of monitoring measures recommended by the panel in the IHA. These measures that will increase detectability include: (1) Maximizing the time spent looking at the water and guarding the exclusion zones; (2) using ''big eye'' binoculars (*e.g.*, 25 x 150 power) from high perches on large, stable platforms; (3) pairing the use of ''big eyes'' with naked eye searching; and (4) using the best possible positions for observing (*e.g.*, outside and as high on the vessel as possible), taking into account weather and other working conditions. All these measures will further increase marine mammal detectability within and around the zones of influence for Level B harassment.

Although it may be difficult to detect *all* marine mammals that are within or entering the larger 160-dB Level B harassment zone, these observations will be corrected for animals undetected in the far field and used to refine post-activity take estimates, which are then reported in the 90-day report. Additionally, behavioral observations within this zone are reported and more generally contribute to our understanding of how marine mammals behaviorally respond to seismic surveys.

Comment 8: AWL states that the IHA must prescribe the ''means of effecting the least practicable impact'' on a species or stock and its habitat, therefore, AWL argues, NMFS should also determine whether there are further monitoring methods available, such as manned or unmanned aerial surveys. Citing the peer-review panel report on open water monitoring plans, AWL states that other far-field monitoring, such as the use of scout vessels, passive acoustic platforms, and satellites, should be studied as well. AWL argues that ''in order to mitigate for some of the difficulties that arise from relying on visual observation, NMFS should consider restricting airgun operations to times in which the safety zones are visible to marine monitors,'' and that ''Statoil should not operate in conditions—such as darkness, fog, or rough seas—in which the observers are unable to ensure that the designated safety zones are free of marine mammals.''

Response: During preparation of the SEA, NMFS considered several additional technologies that could be used to enhance marine mammal monitoring. These new technologies include the use of unmanned aerial vehicles (UAVs), passive acoustic monitoring (PAM), and active acoustic monitoring (AAM) for marine mammals. However, at this time, these technologies are still being developed or refined. For example, while there has been some testing of unmanned aerial vehicles conducted recently, the technology has not yet been proven effective for monitoring or mitigation, as would be required under an IHA.

Regarding the use of PAM, NMFS does not believe that at the current stage, requiring PAM (either towed or stationary) for real-time acoustic monitoring would yield reliable data (Guan *et al.* 2011). During the 2010 open-water seismic survey, Statoil tested a towed PAM for the presence of bowhead whales onboard a support vessel during the seismic operations, and preliminary results show that the detection rates were low (Bruce Martin, pers. comm. March 2011). As far as AAM is concerned, many technical issues (such as detection range and resolution) and unknowns (such as target strength of marine mammal species in the Arctic) remain to be resolved before it can be used as a reliable monitoring tool to aid in the implementation of mitigation measures. Environmental consequences concerning additional sound being introduced into the water column from an active sonar source also need to be addressed. Therefore, NMFS does not believe it is beneficial to adopt these ''emerging'' monitoring technologies based on their current stages of research and development.

NMFS also considered AWL's suggestion of using scout vessels for monitoring marine mammals beyond the visual field where they can be detected by the source vessel. However, since the modeled exclusion zones at received levels of 180 and 190 dB re 1 μPa extend out to approximately 50 and 190 m (164 and 623 ft), respectively, NMFS determined that these distances are within the visual ranges that can be reliably detected by protected species observers (PSOs) onboard the source vessel. Therefore, NMFS does not believe it is beneficial to have additional scout vessels for marine mammal monitoring for this particular survey. Furthermore, deploying additional vessels in the vicinity of Statoil's proposed survey area would only increase anthropogenic impacts to the environment by introducing additional vessel noise into the water column. Concerning the manned aircraft survey, NMFS typically does not require this measure in the Chukchi Sea because it has been determined to be impracticable due to lack of adequate landing facilities and the prevalence of fog and other inclement weather in that area. This could potentially result in an inability to return to the airport of origin, thereby resulting in safety concerns.

NMFS recognizes the limitations of visual monitoring in darkness and other inclement weather conditions. Therefore, in Statoil's IHA, NMFS requires that no seismic airgun can be ramped up when the entire exclusion zones are not visible (*i.e.,* darkness or poor weather conditions). However, Statoil's operations will occur in an area where periods of darkness do not begin until early September. Beginning in early September, there will be approximately 1–3 hours of darkness each day, with periods of darkness increasing by about 30 min each day. By the end of the survey period, there will be approximately 8 hours of darkness each day. These conditions provide PSOs favorable monitoring conditions for most of the time.

Subsistence Issues

Comment 9: AEWC states that NMFS failed to consider adequately the potential impacts to the fall subsistence hunt of bowhead whales in Chukchi Sea villages. Over the past several years, worsening ice conditions have made it more dangerous and difficult for whale captains and their crews to carry out the

larger spring bowhead whale hunt. Because of the changing conditions, crews from Wainwright, Point Hope and Point Lay have all been conducting fall hunts in an effort to provide for their communities and meet their allotted quotas. Last year, Wainwright landed a bowhead whale for the first time during the fall, which provided critical food for the community and served as a great source of pride and celebration.

Response: NMFS does not agree with AEWC's contention that it failed to adequately consider impacts to the fall subsistence hunt. The potential impacts from the proposed Statoil survey were fully analyzed and addressed in both the **Federal Register** notice for the proposed IHA (76 FR 30110; May 24, 2011) and in the SEA. The proposed survey area is ~160 km (~100 mi) northwest of Wainwright offshore. Based on the small scale of the proposed shallow hazards survey, the radius of the modeled 160 dB isopleths is 2.25 km (1.4 mi) from the source, and the 120 dB isopleths is about 39 km (24 mi) from the source. Therefore, the area where the received level could reach 160 dB is approximately 140 km (87 mi) offshore. Subsistence whaling typically occurs nearshore. In the Chukchi Sea region, the fall hunt is generally conducted in an area that extends 16 km (10 mi) west of Barrow to 48 km (30 mi) north of Barrow. This is also confirmed by AEWC in its comment letter that ''[s]ubsistence hunters have a limited hunting range and prefer to take whales close to shore so as to avoid hauling a harvested whale a long distance over which the whale could spoil. During the fall, however, subsistence hunters in the Chukchi Sea will pursue bowhead whales as far as 50 miles (80 km) from the coast in small, fiberglass boats.'' Therefore, it is highly unlikely that the fall subsistence hunt could be affected given the industry activities would occur much further offshore.

NEPA Concerns

Comment 10: AWL notes that NMFS is preparing a Programmatic EIS (PEIS), and that without a final EIS, additional oil and gas exploration in the Chukchi Sea is especially problematic given the critical information gaps that still exist today. AWL states that without information on the seasonal presence and distribution patterns of marine mammals, the agency would find it challenging to meet its obligations under the MMPA. AWL states that NMFS should refrain from issuing additional authorizations until more is known.

Response: While the Final EIS is still being developed, NMFS conducted a thorough analysis of the affected environment and environmental consequences from seismic surveys in the Arctic in 2010 and prepared the 2010 EA specific to two open-water seismic activities by Shell and Statoil. For the issuance of an IHA to Statoil for its 2011 open-water shallow hazards survey, NMFS has determined that the information contained in the 2010 EA is adequate and that no significant changes relating to the environment and potential impacts from human activities have resulted since the 2010 EA, and that Statoil's proposed 2011 open-water shallow hazards surveys are essentially the same as the activities analyzed in the 2010 EA. Therefore, the 2010 EA is incorporated by reference in the 2011 SEA for the issuance of an IHA to Statoil for their open-water shallow hazards surveys in 2011.

While the analysis contained in the Final EIS will apply more broadly to Arctic oil and gas operations, NMFS' issuance of an IHA to Statoil for the taking of several species of marine mammals incidental to conducting its open-water shallow hazards survey in the Chukchi Sea in 2011, as analyzed in the SEA, is not expected to significantly affect the quality of the human environment. Statoil's surveys are not expected to significantly affect the quality of the human environment because of the limited duration and scope of operations. Additionally, the SEA and the 2010 EA contained a full analysis of cumulative impacts.

Miscellaneous Issues

Comment 11: AEWC states that in the past, they have remained in close communication with Statoil in the hopes that Statoil would be able to reach agreement with their whaling captains on a set of mitigation measures to protect subsistence whaling activities, but Statoil has been unwilling to enter into a Conflict Avoidance Agreement (CAA) with the impacted communities. In the absence of the signed CAA, AEWC requests that NMFS adopt, as mandatory requirements set forth in the IHA, the mitigation measures found in Titles II (Open Water Season Communications) and V (Avoiding Conflicts During the Open Water Season) of the 2011 CAA, which is attached with the AEWC comment letter.

Response: As NMFS has mentioned previously, the signing of a CAA is not a requirement to obtain an IHA. The CAA is a document that is negotiated between and signed by the industry participant, AEWC, and the Village Whaling Captains' Associations. NMFS has no role in the development or execution of this agreement. Although the contents of a CAA may inform NMFS' no unmitigable adverse impact determination for bowhead and beluga whales, the signing of it is not a requirement. While a CAA has not been signed and a final version agreed to by industry participants, AEWC, and the Village Whaling Captains' Associations has not been provided, NMFS was provided with a copy of the version ready for signature by AEWC. NMFS has reviewed the CAA and included several measures from Titles II and V of the document which relate to marine mammals and avoiding conflicts with subsistence hunts in the IHA. Some of the conditions which have been added to the IHA include: (1) Avoiding concentrations of whales and reducing vessel speed when near whales; (2) conducting sound source verification measurements; and (3) participating in the Communication Centers. Despite the lack of a signed CAA for 2011 activities, NMFS is confident that the measures contained in the IHA (some of which were taken directly from the 2011 CAA) will ensure no unmitigable adverse impact to subsistence users.

In addition, Statoil has agreed to utilize the Wainwright communication center (Com-Center) in order to communicate with subsistence vessels during its 2011 operations. The Com-Center will be staffed by Inupiat operators where practicable. The Com-Center will be operated twenty-four (24) hours per day during the 2011 subsistence bowhead whale hunt. The Com-Center will have an Inupiat operator on duty 24 hours per day from August 15 until the end of the 2011 subsistence bowhead whale hunt and during Statoil's 2011 activities in the Chukchi Sea. The Com-Center will be managed and overseen by the Olgoonik-Fairweather JV. The Com-Center operators will be available to receive radio and telephone calls and to call vessels.

Following the completion of the 2011 Chukchi Sea open-water season and prior to the 2012 Preseason Introduction Meetings, Statoil, if requested by the AEWC or the Whaling Captains' Association of each village, will host a meeting in each of the following villages: Wainwright, Pt. Lay, Pt. Hope, and Barrow (or a joint meeting of the whaling captains from all of these villages if the whaling captains agree to a joint meeting) to review the results of the 2011 operations and to discuss any concerns residents of those villages might have regarding the operations. To the extent possible, the meetings will include the PSOs stationed on Statoil's vessels in the Chukchi Sea.

In summary, the measures that Statoil has taken, and will take, under the POC and Marine Mammal Monitoring and Mitigation Plan (4MP) are similar to the measures identified in the draft CAA provided by AEWC. Below, Statoil and NMFS identify the key conflict-avoidance provisions of the CAA, and identify the corresponding provisions of the POC, 4MP, and the Participation Agreement focused on minimizing impacts to the environment and subsistence resources in the Chukchi Sea.

Regarding AEWC's request for NMFS to adopt certain sections of the 2011 CAA as the mitigation measures (*i.e.,* Title II and Title V), NMFS carefully reviewed these sections and found that they are within the mitigation measures NMFS prescribed to Statoil under the IHA issued for mitigating subsistence harvest during Statoil's proposed shallow hazards surveys in the Chukchi Sea during the 2011 open-water season. However, these sections also contain requirements that NMFS does not believe are pertinent to Statoil's proposed 2011 open-water shallow hazards surveys. For instance, the draft CAA calls for funding of Com-Centers and to provide communication equipment in Deadhorse and Kaktovik, which are villages on the coast of the Beaufort Sea, far away from Statoil's planned Chukchi Sea operations. Therefore, NMFS does not believe it is appropriate to adopt these sections of the draft CAA in their entirety as mitigation measures for subsistence.

Monitoring Plan Peer Review

The MMPA requires that monitoring plans be independently peer reviewed ''where the proposed activity may affect the availability of a species or stock for taking for subsistence uses'' (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state, ''Upon receipt of a complete monitoring plan, and at its discretion, [NMFS] will either submit the plan to members of a peer review panel for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan'' (50 CFR 216.108(d)).

NMFS convened an independent peer review panel to review Statoil's Marine Mammal Monitoring and Mitigation Plan (4MP) for Shallow Hazards and Site Clearance Surveys and Geotechnical Soil Investigations in the Alaskan Chukchi Sea, 2011. The panel met on March 9, 2011, and provided their final report to NMFS on April 27, 2011. The full panel report can be viewed at: *http://www.nmfs.noaa.gov/pr/pdfs/permits/openwater/peer_review_report2011.pdf*.

NMFS provided the panel with Statoil's 4MP and asked the panel to address the following questions and issues for Statoil's plan:

(1) Are the applicant's stated objectives the most useful for understanding impacts on marine mammals and otherwise accomplishing the goals stated in the paragraph above?

(2) Are the applicant's stated objectives able to be achieved based on the methods described in the plan?

(3) Are there techniques not proposed by the applicant, or modifications to the techniques proposed by the applicant, that should be considered for inclusion in the applicant's monitoring program to better accomplish the goals stated above?

(4) What is the best way for an applicant to present their data and results (formatting, metrics, graphics, etc.) in the required reports that are to be submitted to NMFS?

Section 4 of the report contains recommendations that the panel members felt were applicable to all of the monitoring plans that they reviewed this year. Section 5.1 of the report contains recommendations specific to Statoil's 2011 shallow hazards survey monitoring plan. Specifically, for the general recommendations, the panel commented on issues related to: (1) Acoustic effects of oil and gas exploration—assessment and mitigation; (2) aerial surveys; (3) marine mammal observers; (4) visual near-field monitoring; (5) visual far-field monitoring; (6) baseline biological and environmental information; (7) comprehensive ecosystem assessments and cumulative impacts; (8) duplication of seismic survey effort; (9) improving take estimates and statistical inference into effects of the activity; and (10) improving the peer-review process.

NMFS has reviewed the report and evaluated all recommendations made by the panel. NMFS has determined that there are several measures that Statoil can incorporate into its 2011 open-water shallow hazards surveys 4MP to improve it. Additionally, there are other recommendations that NMFS has determined would also result in better data collection and could potentially be implemented by oil and gas industry applicants, but which likely could not be implemented for the 2011 open-water season due to technical issues (see below). While it may not be possible to implement those changes this year, NMFS believes that they are worthwhile and appropriate suggestions that may require a bit more time to implement, and Statoil should consider incorporating them into future monitoring plans should Statoil decide to apply for IHAs in the future.

The following subsections lay out measures that NMFS recommends for implementation as part of the 2011 open-water shallow hazards surveys 4MP and those that are recommended for future programs, as well as recommendations for future MMPA authorization applications and presentations at future Open Water Meetings. The panel recommendations determined by NMFS that are appropriate for inclusion in the 2011 program have been discussed with Statoil and are included in the IHA.

Recommendations for Inclusion in the 2011 4MP and IHA

- Section 4.3 of the report contains several recommendations regarding marine mammal observers (PSOs). NMFS agrees that the following measures should be incorporated into the 2011 Monitoring Plan:
  - PSOs record additional details about unidentified marine mammal sightings, such as ''blow only'', mysticete with (or without) a dorsal fin, ''seal splash'', etc. That information should also be included in 90-day and final reports.
- In Section 4.7, panelists included a section regarding the need for a more robust and comprehensive means of assessing the collective or cumulative impact of many of the varied human activities that contribute noise into the Arctic environment. Specifically, for data analysis and integration, the panelists recommended, and NMFS agrees, that the following recommendations be incorporated into the 2011 program:
  - To better assess impacts to marine mammals, data analysis should be separated into periods when a seismic airgun array (or a single mitigation airgun) is operating and when it is not. Final and comprehensive reports to NMFS should summarize and plot:
    - Data for periods when a seismic array is active and when it is not; and
    - The respective predicted received sound conditions over fairly large areas (tens of km) around operations.
  - To better understand the potential effects of oil and gas activities on marine mammals and to facilitate integration among companies and other researchers, the following data should be obtained and provided electronically in the final and comprehensive reports:
    - The location and time of each aerial or vessel-based sighting or acoustic detection;
    - Position of the sighting or acoustic detection relative to ongoing operations

(*i.e.,* distance from sightings to seismic operation, drilling ship, support ship, etc.), if known;

■ The nature of activities at the time (*e.g.,* seismic on/off);

■ Any identifiable marine mammal behavioral response (sighting data should be collected in a manner that will not detract from the PSO's ability to detect marine mammals); and

■ Any adjustments made to operating procedures.

• In Section 4.9, the panelists discussed improving take estimates and statistical inference into effects of the activities. NMFS agrees that the following measures should be incorporated into the 2011 Monitoring Plan:

○ Reported results from all hypothesis tests should include estimates of the associated statistical power when practicable.

○ Estimate and report uncertainty in all take estimates. Uncertainty could be expressed by the presentation of confidence limits, a minimum-maximum, posterior probability distribution, etc.; the exact approach would be selected based on the sampling method and data available.

• Section 5.1 of the report contains recommendations specific to Statoil's 2011 shallow hazards survey monitoring plan. Of the recommendations presented in this section, NMFS has determined that the following should be implemented for the 2011 season:

○ Conduct sound source verification for the sub-bottom profilers.

○ The report should clearly compare authorized takes to the level of actual estimated takes.

○ As a starting point for integrating different data sources, Statoil should present their 2010 and 2011 data by plotting acoustic detections from bottom-mounted hydrophones and visual detections from PSOs on a single map.

• In addition, the panelists included a list of general recommendations from the 2010 Peer-review Panel Report to be implemented by operators in their 2011 open-water season activities. NMFS agrees that the following recommendations should be implemented in Statoil's 2011 monitoring plan:

○ Observers should be trained using visual aids (*e.g.,* videos, photos), to help them identify the species that they are likely to encounter in the conditions under which the animals will likely be seen.

○ Observers should understand the importance of classifying marine mammals as ''unknown'' or ''unidentified'' if they cannot identify the animals to species with confidence. In those cases, they should note any information that might aid in the identification of the marine mammal sighted (and this information should be included in the report). For example, for an unidentified mysticete whale, the observers should record whether the animal had a dorsal fin.

○ Observers should attempt to maximize the time spent looking at the water and guarding the safety radii. They should avoid the tendency to spend too much time evaluating animal behavior or entering data on forms, both of which detract from their primary purpose of monitoring the safety zone.

○ ''Big eye'' binoculars (*e.g.,* 25 x 150 power) should be used from high perches on large, stable platforms. They are most useful for monitoring impact zones that extend beyond the effective line of sight. With two or three observers on watch, the use of big eyes should be paired with searching by naked eye, the latter allowing visual coverage of nearby areas to detect marine mammals. When a single observer is on duty, the observer should follow a regular schedule of shifting between searching by naked eye, low-power binoculars, and big-eye binoculars based on the activity, the environmental conditions, and the marine mammals of concern.

○ Observers should use the best possible positions for observing (*e.g.,* outside and as high on the vessel as possible), taking into account weather and other working conditions.

○ Observer teams should include Alaska Natives, and all observers should be trained together. Whenever possible, new observers should be paired with experienced observers to avoid situations where lack of experience impairs the quality of observations.

○ Conduct efficacy testing of night-vision binoculars and other such instruments to improve near-field monitoring under Arctic conditions.

○ To help evaluate the utility of ramp-up procedures, PSOs shall record, analyze, and report their observations during any ramp-up period.

○ PSOs should carefully document visibility during observation periods so that total estimates of take can be corrected accordingly.

Recommendations for Inclusion in Future Monitoring Plans

In Section 4.7 of the report, the panelists stated that advances in integrating data from multiple platforms through the use of standardized data formats are needed to increase the statistical power to assess potential effects. Therefore, the panelists recommended that industry examine this issue and jointly propose one or several data integration methods to NMFS at the Open Water Meeting in 2012. NMFS concurs with the recommendation and encourages Statoil to collaborate with other companies to discuss data integration methods and to present the results of those discussions at the 2012 Open Water Meeting.

In Section 4.7, the panel also recommended that Statoil's reports include sightability curves (detection functions) for distance-based analyses to help evaluate the effectiveness of PSOs and more effectively estimate take. NMFS discussed this requirement with Statoil on a technical basis and realizes that in most circumstances there are often too few sightings of individual species recorded during a single project to allow reliable estimates of sightability curves. Therefore, sightability curves from previous comprehensive reports (where multi-year or multi-project data have been pooled to achieve adequate sample sizes) are often used and referenced in 90-day reports. Whenever future monitoring data present enough data from a single project, sightability curves will be provided in the report.

In Section 5.1, the panel recommended that Statoil consider other new technologies (*i.e.,* underwater vehicles, satellite monitoring, etc.) to assess far-field monitoring. The panel also recommended investigating other methods for far-field monitoring (*e.g.,* unmanned systems or scout vessels) to be implemented upon approval by NMFS. NMFS agrees that new technologies should be considered to increase our current knowledge regarding marine mammals that could be affected beyond the line of sight from the vessel platform and will discuss this issue with the industry at the 2012 Open Water Meeting.

The panel also recommended using the cluster array to localize whale calls and evaluate the effects of sound on calling animal distribution. However, based on the limited usefulness of data collected on the cluster array last year (2010 open-water season), the areas where the recording arrays were previously used for localizing whales have been expanded to cover a much larger area in 2011, which also include the Hanna Shoal area to potentially capture more information on whale migration.

If more recording arrays are available in the future, NMFS will work with Statoil to deploy these arrays within the proposed project area for localizing calling whales.

Recommendations for Future Applications and Open Water Meetings

In Section 3, panelists recommended that companies specifically report the changes they made in their operations as a result of the previous years' panel recommendations. These should be highlighted in the verbal presentations at the Open Water Meeting, discussed directly with the review panel, and detailed in the 90-day reports (and final reports, if appropriate). NMFS concurs with this recommendation and requests that Statoil include this information in their 90-day report submitted at the conclusion of operations and provide the information in their presentation at the 2012 Open Water Meeting.

In Section 4.1, panelists made a recommendation that IHA holders should report estimates of the spatio-temporal distributions of acoustic levels. This could include reporting levels as low as the 120 dB level. NMFS agrees that applicants should include this information in future MMPA application requests.

In Section 4.7, panelists included a recommendation that could be helpful for the presentation of data at future Open Water Meetings. To allow visualization and interpretation of the complex field of anthropogenic activities and distributions and movements of marine mammals, the final and comprehensive reports required by the IHA should provide all spatial data on figures that depict the locations of the principal sound sources. This could be represented by a diagram in which all PSO sightings (vessel-based and aerial) and acoustic detections are plotted relative to their distance and bearing from a specific sound source. Alternatively, it could be depicted in a map of the region, showing the operation area, tracklines of vessels and aircraft (if applicable), PSO sightings (vessel-based and aerial), and acoustic detections. To facilitate understanding of both the spatial and temporal aspects of the activity and marine mammal responses, these figures would ideally be animated, showing industry activities and sightings or acoustic detections changing through time. Whenever ancillary biological data (*e.g.,* tagging, acoustic, broad-scale aerial survey) are available that are coincident in space and time with the activity, they should be included in these figures. NMFS encourages Statoil to consider this recommendation when preparing figures and videos for reports and the Open Water Meeting.

Recommendations From 2010 Peer-Review Panel for Inclusion in Future Monitoring Plans

Section 3.5 of the 2010 Peer-review Panel report recommends methods for conducting comprehensive monitoring of a large-scale seismic operation. The panelists recommend adding a tagging component to monitoring plans. ''Tagging of animals expected to be in the area where the survey is planned also may provide valuable information on the location of potentially affected animals and their behavioral responses to industrial activities. Although the panel recognized that such comprehensive monitoring might be difficult and expensive, such an effort (or set of efforts) reflects the complex nature of the challenge of conducting reliable, comprehensive monitoring for seismic or other relatively-intense industrial operations that ensonify large areas of ocean''. While this particular recommendation is not feasible for implementation in 2011, NMFS recommends that Statoil consider adding a tagging component to future monitoring plans should Statoil decide to conduct such activities in future years.

Finally, the panel recommended that sightings be entered and archived in a way that enables immediate geospatial depiction to facilitate operational awareness and analysis of risks to marine mammals. Real-time monitoring is especially important in areas of seasonal migration or influx of marine mammals. NMFS worked with Statoil and the panel to identify certain software packages for real-time data entry, mapping, and analysis available for this purpose, but it does not seem that a commercially viable software system is available at this time.

Description of Marine Mammals in the Area of the Specified Activity

Nine cetacean and four seal species could occur in the general area of the site clearance and shallow hazards survey. The marine mammal species under NMFS' jurisdiction most likely to occur near operations in the Chukchi Sea include four cetacean species: Beluga whale (*Delphinapterus leucas*), bowhead whale (*Balaena mysticetus*), gray whale (*Eschrichtius robustus*), and harbor porpoise (*Phocoena phocoena*), and three seal species: Ringed (*Phoca hispida*), spotted (*P. largha*), and bearded seals (*Erignathus barbatus*). The marine mammal species that is likely to be encountered most widely (in space and time) throughout the period of the planned site clearance and shallow hazards surveys is the ringed seal.

Other marine mammal species that have been observed in the Chukchi Sea but are less frequent or uncommon in the project area include narwhal (*Monodon monoceros*), killer whale (*Orcinus orca*), fin whale (*Balaenoptera physalus*), minke whale (*B. acutorostrata*), humpback whale (*Megaptera novaeangliae*), and ribbon seal (*Histriophoca fasciata*). These species could occur in the project area, but each of these species is uncommon or rare in the area and relatively few encounters with these species are expected during the proposed shallow hazards survey. The narwhal occurs in Canadian waters and occasionally in the Beaufort Sea, but it is rare there and is not expected to be encountered. There are scattered records of narwhal in Alaskan waters, including reports by subsistence hunters, where the species is considered extralimital (Reeves *et al.* 2002).

The bowhead, fin, and humpback whales are listed as ''endangered'' under the Endangered Species Act (ESA) and as depleted under the MMPA. Certain stocks or populations of gray, beluga, and killer whales and spotted seals are listed as endangered or proposed for listing under the ESA; however, none of those stocks or populations occur in the proposed activity area. Additionally, the ribbon seal is considered a ''species of concern'' under the ESA. On December 10, 2010, NMFS published a notification of proposed threatened status for subspecies of the ringed seal (75 FR 77476) and a notification of proposed threatened and not warranted status for subspecies and distinct population segments of the bearded seal (75 FR 77496) in the **Federal Register**. Neither species is considered depleted under the MMPA. The polar bear (which is listed as threatened under the ESA) and walrus also occur in the Chukchi Sea. However, both species are under the jurisdiction of the U.S. Fish and Wildlife Service and are therefore not discussed further in this document.

Statoil's application contains information on the status, distribution, seasonal distribution, and abundance of each of the species under NMFS' jurisdiction mentioned in this document. Please refer to the application for that information (see **ADDRESSES**). Additional information can also be found in the NMFS Stock Assessment Reports (SAR). The Alaska 2010 SAR is available at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2010.pdf.*

Potential Effects of the Specified Activity on Marine Mammals

Operating active acoustic sources such as an airgun array has the potential for adverse effects on marine mammals.

Potential Effects of Airgun Sounds on Marine Mammals

The effects of sounds from airgun pulses might include one or more of the following: Tolerance, masking of natural sounds, behavioral disturbance, and temporary or permanent hearing impairment or non-auditory effects (Richardson *et al.* 1995). As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable. The Notice of Proposed IHA (76 FR 30110; May 24, 2011) included a discussion of the effects of airguns on marine mammals, which is not repeated here. That discussion did not take into consideration the monitoring and mitigation measures proposed by Statoil and NMFS. No cases of temporary threshold shift (TTS) are expected as a result of Statoil's activities given the small size of the source, the strong likelihood that baleen whales (especially migrating bowheads) would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any possibility of TTS, and the mitigation measures required to be implemented during the survey described later in this document. Based on the fact that the sounds produced by Statoil's operations are unlikely to cause TTS in marine mammals, it is extremely unlikely that permanent hearing impairment would result. No injuries or mortalities are anticipated as a result of Statoil's operations, and none are authorized to occur. Only Level B harassment is anticipated as a result of Statoil's activities.

Potential Effects From Active Sonar Equipment on Marine Mammals

Several active acoustic sources other than the four 10 in^3 airgun have been proposed for Statoil's 2011 open water shallow hazards survey in the Chukchi Sea. The specifications of this sonar equipment (source levels and frequency ranges) were provided in the Notice of Proposed IHA (76 FR 30110; May 24, 2011). In general, the potential effects of this equipment on marine mammals are similar to those from the airgun, except the magnitude of the impacts is expected to be much less due to the lower intensity and higher frequencies. In some cases, due to the fact that the operating frequencies of some of this equipment (*e.g.,* Multi-beam echosounder: frequency at 200–400 kHz) are above the hearing ranges of marine mammals, they are not expected to have any impacts to marine mammals. The Notice of Proposed IHA (76 FR 30110; May 24, 2011) contains a discussion of impacts to marine mammals from vessel sounds, which is not repeated here.

Anticipated Effects on Habitat

The primary potential impacts to marine mammals and other marine species are associated with elevated sound levels produced by airguns and other active acoustic sources. However, other potential impacts to the surrounding habitat from physical disturbance are also possible.

Potential Impacts on Prey Species

With regard to fish as a prey source for cetaceans and pinnipeds, fish are known to hear and react to sounds and to use sound to communicate (Tavolga *et al.* 1981) and possibly avoid predators (Wilson and Dill 2002). Experiments have shown that fish can sense both the strength and direction of sound (Hawkins 1981). Primary factors determining whether a fish can sense a sound signal, and potentially react to it, are the frequency of the signal and the strength of the signal in relation to the natural background noise level.

The level of sound at which a fish will react or alter its behavior is usually well above the detection level. Fish have been found to react to sounds when the sound level increased to about 20 dB above the detection level of 120 dB (Ona 1988); however, the response threshold can depend on the time of year and the fish's physiological condition (Engas *et al.* 1993). In general, fish react more strongly to pulses of sound rather than a continuous signal (Blaxter *et al.* 1981), and a quicker alarm response is elicited when the sound signal intensity rises rapidly compared to sound rising more slowly to the same level.

Investigations of fish behavior in relation to vessel noise (Olsen *et al.* 1983; Ona 1988; Ona and Godo 1990) have shown that fish react when the sound from the engines and propeller exceeds a certain level. Avoidance reactions have been observed in fish such as cod and herring when vessels approached close enough that received sound levels are 110 dB to 130 dB (Nakken 1992; Olsen 1979; Ona and Godo 1990; Ona and Toresen 1988). However, other researchers have found that fish such as polar cod, herring, and capelin are often attracted to vessels (apparently by the noise) and swim toward the vessel (Rostad *et al.* 2006). Typical sound source levels of vessel noise in the audible range for fish are 150 dB to 170 dB (Richardson *et al.* 1995).

Some mysticetes, including bowhead whales, feed on concentrations of zooplankton. Some feeding bowhead whales may occur in the Alaskan Beaufort Sea in July and August, and others feed intermittently during their westward migration in September and October (Richardson and Thomson [eds.] 2002; Lowry *et al.* 2004). However, by the time most bowhead whales reach the Chukchi Sea (October), they will likely no longer be feeding, or if it occurs it will be very limited. A reaction by zooplankton to a seismic impulse would only be relevant to whales if it caused concentrations of zooplankton to scatter. Pressure changes of sufficient magnitude to cause that type of reaction would probably occur only very close to the source. Impacts on zooplankton behavior are predicted to be negligible, and that would translate into negligible impacts on feeding mysticetes. Thus, the activity is not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or their populations.

Mitigation Measures

In order to issue an incidental take authorization under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses.

For Statoil's open-water shallow hazards survey in the Chukchi Sea, Statoil worked with NMFS and agreed upon the following mitigation measures to minimize the potential impacts to marine mammals in the project vicinity as a result of the shallow hazards survey activities.

As part of the application, Statoil submitted to NMFS a Marine Mammal Monitoring and Mitigation Program (4MP) for its open-water shallow hazards survey in the Chukchi Sea during the 2011 open-water season. The objectives of the 4MP are:

- To ensure that disturbance to marine mammals and subsistence hunts is minimized and all permit stipulations are followed,
- To document the effects of the proposed survey activities on marine mammals, and

• To collect baseline data on the occurrence and distribution of marine mammals in the study area.

The 4MP has been modified based on comments received from the peer review panel (see the ''Monitoring Plan Peer Review'' section earlier in this document).

For Statoil's 2011 open-water shallow water hazards surveys in the Chukchi Sea, the following mitigation measures are required.

(1) Sound Source Measurements

Previous measurements of similar airgun arrays in the Chukchi Sea were used to model the distances at which received levels are likely to fall below 120, 160, 180, and 190 dB re 1 μPa (rms) from the planned airgun sources. These modeled distances will be used as temporary exclusion radii until measurements of the airgun sound source are conducted. The measurements will be made at the beginning of the field season, and the measured radii used for the remainder of the survey period.

The objectives of the sound source verification measurements planned for 2011 in the Chukchi Sea will be to measure the distances at which broadband received levels reach 190, 180, 170, 160, and 120 dB_{rms} re 1 μPa for the airgun configurations that may be used during the survey activities. The configurations will include at least the full array (4×10 in^3) and the operation of a single 10 in^3 airgun that will be used during power downs or very shallow penetration surveys. The measurements of airgun sounds will be made by an acoustics contractor at the beginning of the survey. The distances to the various radii will be reported as soon as possible after recovery of the equipment. The primary radii of concern will be the 190 and 180 dB exclusion radii for pinnipeds and cetaceans, respectively, and the 160 dB disturbance radii. In addition to reporting the radii of specific regulatory concern, nominal distances to other sound isopleths down to 120 dB_{rms} will be reported in increments of 10 dB. Sound levels during soil investigation operations will also be measured. However, source levels are not expected to be strong enough to require mitigation actions at the 190 dB or 180 dB levels.

Data will be previewed in the field immediately after download from the hydrophone instruments. An initial sound source analysis will be supplied to NMFS and the vessel within 120 hours of completion of the measurements, if possible. The report will indicate the distances to sound levels based on fits of empirical transmission loss formulae to data in the endfire and broadside directions. A more detailed report will be submitted to NMFS as part of the 90-day report following completion of the acoustic program.

(2) Exclusion Zones

Under current NMFS guidelines, ''exclusion zones'' for marine mammal exposure to impulse sources are customarily defined as the distances within which received sound levels are $\geq$180 dB_{rms} re 1 μPa for cetaceans and $\geq$190 dB_{rms} re 1 μPa for pinnipeds. These criteria are based on an assumption that SPLs received at levels lower than these will not injure these animals or impair their hearing abilities, but that at higher levels they might have some such effects. Disturbance or behavioral effects to marine mammals from underwater sound may occur after exposure to sound at distances greater than the exclusion zones (Richardson *et al.* 1995).

Initial exclusion and disturbance zones for the sound levels produced by the planned airgun configurations have been estimated (Table 1). These zones will be used for mitigation purposes until results of direct measurements are available early during the exploration activities. The proposed surveys will use an airgun source composed of four 10-in^3 airguns (total discharge volume of 40 in^3) and a single 10 in^3 airgun. Underwater sound propagation from a similar 4×10-in^3 airgun cluster and single 10 in^3 was measured in 2009 (Reiser *et al.* 2010). Those measurements resulted in 90th percentile propagation loss equations of $RL = 218.0 - 17.5LogR - 0.00061R$ for the 4×10 in^3 airgun cluster and $RL = 204.4 - 16.0LogR - 0.00082R$ for the single 10 in^3 airgun (where RL = received level and R = range). The estimated distances for the 2011 activities are based on a 25% increase over 2009 results (Table 1).

In addition to the site surveys, Statoil plans to use a dedicated vessel to conduct geotechnical soil investigations. Sounds produced by the vessel and soil investigation equipment are not expected to be above 180 dB (rms). Therefore, mitigation related to acoustic impacts from these activities is not expected to be necessary.

An acoustics contractor will perform direct measurements of the received levels of underwater sound versus distance and direction from the airguns and soil investigation vessel using calibrated hydrophones. The acoustic data will be analyzed as quickly as reasonably practicable in the field and used to verify and adjust the exclusion zones. The field report will be made available to NMFS and the PSOs within 120 hrs of completing the measurements. The mitigation measures to be implemented at the 190 and 180 dB sound levels will include power downs and shut downs as described below.

TABLE 1—DISTANCES TO SPECIFIED RECEIVED LEVELS MEASURED FROM A 4×10 IN^3 AIRGUN CLUSTER AND A SINGLE 10-IN^3 AIRGUN ON THE BURGER PROSPECT IN 2009 AS REPORTED BY REISER *et al.* (2010). THE 2011 ''PRE-SSV'' DISTANCES ARE A PRECAUTIONARY 25% INCREASE ABOVE THE REPORTED 2009 RESULTS AND WILL BE USED BY PSOS FOR MITIGATION PURPOSES UNTIL AN SSV IS COMPLETED IN 2011

Received levels (dB re 1 μPa rms)	Distance (m)			
	Airgun cluster (4 x 10 in^3)		Single airgun (1 x 10 in^3)	
	2009 Results	2011 pre-SSV	2009 Results	2011 pre-SSV
190	39	50	8	10
180	150	190	34	45
160	1,800	2,250	570	715
120	31,000	39,000	19,000	24,000

(3) Speed and Course Alterations

If a marine mammal is detected outside the applicable exclusion zone and, based on its position and the relative motion, is likely to enter the exclusion radius, changes of the vessel's speed and/or direct course will be considered if this does not compromise operational safety. For marine seismic surveys using large streamer arrays, course alterations are not typically possible. However, for the smaller airgun array and streamer planned during Statoil's site surveys, such changes may be possible. After any such speed and/or course alteration is begun, the marine mammal activities and movements relative to the survey vessel will be closely monitored to ensure that the marine mammal does not approach within the applicable exclusion zone. If the mammal appears likely to enter the exclusion zone, further mitigative actions will be taken, including a power down or shut down of the airgun(s).

In addition, Statoil vessels are required to comply with the following conditions concerning their speed with their relation of distances to whales:

- All vessels should reduce speed when within 300 yards (274 m) of whales, and those vessels capable of steering around such groups should do so. Vessels may not be operated in such a way as to separate members of a group of whales from other members of the group;
- Avoid multiple changes in direction and speed when within 300 yards (274 m) of whales; and
- When weather conditions require, such as when visibility drops, support vessels must adjust speed (increase or decrease) and direction accordingly to avoid the likelihood of injury to whales.

(4) Power Downs

A power down for immediate mitigation purposes is the immediate reduction in the number of operating airguns such that the exclusion zones of the 190 dB_{rms} and 180 dB_{rms} areas are decreased to the extent that an observed marine mammal(s) are not in the applicable exclusion zone of the full array. Power downs are also used while the vessel turns from the end of one survey line to the start of the next. During a power down, one airgun (or some other number of airguns less than the full airgun array) continues firing. The continued operation of one airgun is intended to (a) Alert marine mammals to the presence of the survey vessel in the area, and (b) retain the option of initiating a ramp up to full operations under poor visibility conditions.

The array will be immediately powered down whenever a marine mammal is sighted approaching close to or within the applicable exclusion zone of the full array but is outside the applicable exclusion zone of the single mitigation airgun. Likewise, if a mammal is already within the exclusion zone when first detected, the airguns will be powered down immediately. If a marine mammal is sighted within or about to enter the applicable exclusion zone of the single airgun, it too will be shut down (see following section).

Following a power down, operation of the full airgun array will not resume until the marine mammal has cleared the exclusion zone. The animal will be considered to have cleared the exclusion zone if it:

- Is visually observed to have left the exclusion zone of the full array, or
- Has not been seen within the zone for 15 min in the case of pinnipeds or small odontocetes, or
- Has not been seen within the zone for 30 min in the case of mysticetes or large odontocetes.

(5) Shut Downs

The operating airgun(s) will be shut down completely if a marine mammal approaches or enters the then-applicable exclusion zone, and a power down is not practical or adequate to reduce exposure to less than 190 or 180 dB_{rms}, as appropriate. In most cases, this means the mitigation airgun will be shut down completely if a marine mammal approaches or enters the estimated exclusion zone around the single 10 in^3 airgun while it is operating during a power down. Airgun activity will not resume until the marine mammal has cleared the exclusion zone. The animal will be considered to have cleared the exclusion zone as described above under power down procedures.

A shut down of the borehole drilling equipment may be requested by PSOs if an animal is sighted approaching the vessel close enough to potentially interact with and be harmed by the soil investigation operation.

(6) Ramp Ups

A ramp up of an airgun array provides a gradual increase in sound levels and involves a step-wise increase in the number and total volume of airguns firing until the full volume is achieved. The purpose of a ramp up (or ''soft start'') is to ''warn'' cetaceans and pinnipeds in the vicinity of the airguns and to provide the time for them to leave the area and thus avoid any potential injury or impairment of their hearing abilities.

During the proposed site survey program, the seismic operator will ramp up the airgun cluster slowly. Full ramp ups (*i.e.,* from a cold start after a shut down, when no airguns have been firing) will begin by firing a single airgun in the array. The minimum duration of a shut-down period, *i.e.,* without airguns firing, which must be followed by a ramp up is typically the amount of time it would take the source vessel to cover the 180-dB exclusion zone. Given the small size of the planned airgun array, it is estimated that period would be about 1–2 minutes based on the modeling results described above and a survey speed of 4 kts.

A full ramp up, after a shut down, will not begin until there has been a minimum of 30 minutes of observation of the exclusion zone by PSOs to ensure that no marine mammals are present. The entire exclusion zone must be visible during the 30-minute lead-in to a full ramp up. If the entire exclusion zone is not visible, then ramp up from a cold start cannot begin. If a marine mammal(s) is sighted within the exclusion zone during the 30-minute watch prior to ramp up, ramp up will be delayed until the marine mammal(s) is sighted outside of the exclusion zone or the animal(s) is not sighted for at least 15–30 minutes: 15 minutes for small odontocetes and pinnipeds, or 30 minutes for baleen whales and large odontocetes.

During turns or brief transits between survey transects, one airgun will continue operating. The ramp-up procedure will still be followed when increasing the source levels from one airgun to the full 4-airgun cluster. However, keeping one airgun firing will avoid the prohibition of a cold start during darkness or other periods of poor visibility. Through use of this approach, survey operations can resume upon entry to a new transect without the 30-minute watch period of the full exclusion zone required for a cold start. PSOs will be on duty whenever the airguns are firing during daylight and during the 30-min periods prior to ramp-ups, as well as during ramp-ups. Daylight will occur for 24 hr/day until mid-August, so until that date PSOs will automatically be observing during the 30-minute period preceding a ramp up. Later in the season, PSOs will be called to duty at night to observe prior to and during any ramp ups. The survey operator and PSOs will maintain records of the times when ramp-ups start and when the airgun arrays reach full power.

(7) Mitigation Measures Concerning Baleen Whale Aggregations

A 160-dB vessel monitoring zone for large whales will be established and monitored in the Chukchi Sea during all

shallow hazards surveys. Whenever a large number of bowhead whales or gray whales (12 or more whales of any age/sex class that appear to be engaged in a non-migratory, significant biological behavior (*e.g.,* feeding, socializing)) are observed during a vessel monitoring program within the 160-dB exclusion zone around the survey operations, the survey activity will not commence or will shut down, until no more than 12 whales are present within the 160-dB exclusion zone of shallow hazards surveying operations.

(8) Subsistence Mitigation Measures

Statoil plans to introduce the following mitigation measures, plans, and programs to potentially affected subsistence groups and communities. These measures, plans, and programs have been effective in past seasons of work in the Arctic and were developed in past consultations with these communities.

Statoil will not be entering the Chukchi Sea until early August, so there will be no potential conflict with spring bowhead whale or beluga subsistence whaling in the polynya zone. Statoil's planned activities area is ~100 mi (~161 km) northwest of Wainwright, which reduces the potential impact to subsistence hunting activities occurring along the Chukchi Sea coast.

The communication center in Wainwright will be jointly funded by Statoil and other operators, and Statoil will routinely call the communication center according to the established protocol while in the Chukchi Sea. Depending on survey progress, Statoil may perform a crew change in the Nome area in Alaska. The crew change will not involve the use of helicopters. Statoil does have a contingency plan for a potential transfer of a small number of crew via ship-to-shore vessel at Wainwright. If this should become necessary, the Wainwright communications center will be contacted to determine the appropriate vessel route and timing to avoid potential conflict with subsistence users.

Prior to survey activities, Statoil will identify transit routes and timing to avoid other subsistence use areas and communicate with coastal communities before operating in or passing through these areas.

Mitigation Conclusions

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS and proposed by the independent peer review panel, NMFS has determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting Measures

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

Monitoring Measures

The following monitoring measures are required for Statoil's 2011 open-water shallow hazards surveys in the Chukchi Sea.

(1) Vessel-Based PSOs

Vessel-based monitoring for marine mammals will be done by trained PSOs throughout the period of marine survey activities. PSOs will monitor the occurrence and behavior of marine mammals near the survey vessel during all daylight periods during operation and during most daylight periods when airgun operations are not occurring. PSO duties will include watching for and identifying marine mammals, recording their numbers, distances, and reactions to the survey operations, and documenting ''take by harassment'' as defined by NMFS.

A sufficient number of PSOs will be required onboard the survey vessel to meet the following criteria: (1) 100% monitoring coverage during all periods of survey operations in daylight; (2) maximum of 4 consecutive hours on watch per PSO; and (3) maximum of 12 hours of watch time per day per PSO.

PSO teams will consist of Inupiat observers and experienced field biologists. An experienced field crew leader will supervise the PSO team onboard the survey vessel. The total number of PSOs may decrease later in the season as the duration of daylight decreases. Statoil currently plans to have 5 PSOs aboard the site survey vessel and 3 PSOs aboard the soil investigation vessel, with the potential of reducing the number of PSOs later in the season as daylight periods decrease in length.

Crew leaders and most other biologists serving as observers in 2011 will be individuals with experience as observers during recent seismic or shallow hazards monitoring projects in Alaska, the Canadian Beaufort, or other offshore areas in recent years.

Observer teams shall include Alaska Natives, and all observers shall be trained together. Whenever possible, new observers shall be paired with experienced observers to avoid situations where lack of experience impairs the quality of observations.

Observers will complete a two or three-day training session on marine mammal monitoring, to be conducted shortly before the anticipated start of the 2011 open-water season. The training session(s) will be conducted by qualified marine mammalogists with extensive crew-leader experience during previous vessel-based monitoring programs. A marine mammal observers' handbook, adapted for the specifics of the planned survey program will be reviewed as part of the training.

Primary objectives of the training include:

- Review of the marine mammal monitoring plan for this project, including any amendments specified by NMFS in the IHA, by USFWS or Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), or by other agreements in which Statoil may elect to participate;
- Review of marine mammal sighting, identification, and distance estimation methods;
- Review of operation of specialized equipment (reticle binoculars, night vision devices [NVDs], and GPS system);
- Review of, and classroom practice with, data recording and data entry systems, including procedures for

recording data on marine mammal sightings, monitoring operations, environmental conditions, and entry error control. These procedures will be implemented through use of a customized computer database and laptop computers;

• Review of the specific tasks of the Inupiat Communicator.

Observers should be trained using visual aids (*e.g.,* videos, photos), to help them identify the species that they are likely to encounter in the conditions under which the animals will likely be seen.

Observers should attempt to maximize the time spent looking at the water and guarding the exclusion radii. They should avoid the tendency to spend too much time evaluating animal behavior or entering data on forms, both of which detract from their primary purpose of monitoring the exclusion zone.

Observers should use the best possible positions for observing (*e.g.,* outside and as high on the vessel as possible), taking into account weather and other working conditions.

The observer(s) will watch for marine mammals from the best available vantage point on the survey vessels, typically the bridge. The observer(s) will scan systematically with the unaided eye and 7 × 50 reticle binoculars, supplemented with 20 × 60 image-stabilized Zeiss Binoculars or Fujinon 25 × 150 ''Big-eye'' binoculars, and night-vision equipment when needed (see below). Personnel on the bridge will assist the PSOs in watching for marine mammals.

Information to be recorded by PSOs will include the same types of information that were recorded during recent monitoring programs associated with industry activity in the Arctic (*e.g.,* Ireland *et al.* 2009). When a mammal sighting is made, the following information about the sighting will be recorded:

(A) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from the PSO, apparent reaction to activities (*e.g.,* none, avoidance, approach, paralleling, etc.), closest point of approach, and behavioral pace;

(B) Time, location, speed, activity of the vessel, sea state, ice cover, visibility, and sun glare;

(C) The positions of other vessel(s) in the vicinity of the PSO location;

(D) Any identifiable marine mammal behavioral response (sighting data should be collected in a manner that will not detract from the PSO's ability to detect marine mammals);

(E) any adjustments made to operating procedures; and

(F) observations during any ramp-up period.

Observers should understand the importance of classifying marine mammals as ''unknown'' or ''unidentified'' if they cannot identify the animals to species with confidence. In those cases, they should note any information that might aid in the identification of the marine mammal sighted (and this information should be included in the report). For example, for an unidentified mysticete whale, the observers should record whether the animal had a dorsal fin.

Additional details about unidentified marine mammal sightings, such as ''blow only'', mysticete with (or without) a dorsal fin, ''seal splash'', etc., shall be recorded. That information should also be included in 90-day and final reports.

PSOs should carefully document visibility during observation periods so that total estimates of take can be corrected accordingly.

The ship's position, speed of support vessels, and water temperature, water depth, sea state, ice cover, visibility, and sun glare will also be recorded at the start and end of each observation watch, every 30 minutes during a watch, and whenever there is a change in any of those variables.

Monitoring at Night and in Poor Visibility

Night-vision equipment (Generation 3 binocular image intensifiers, or equivalent units) will be available for use when/if needed. Past experience with NVDs in the Beaufort and Chukchi seas and elsewhere has indicated that NVDs are not nearly as effective as visual observation during daylight hours (*e.g.,* Harris *et al.* 1997, 1998; Moulton and Lawson 2002).

Conduct efficacy testing of night-vision binoculars and other such instruments to improve near-field monitoring under Arctic conditions and compare with the 2010 monitoring results.

(2) Acoustic Monitoring

Sound Source Measurements

As described above, previous measurements of airguns in the Chukchi Sea were used to estimate the distances at which received levels are likely to fall below 120, 160, 180, and 190 dB_{rms} from the planned airgun sources. These modeled distances will be used as temporary exclusion radii until measurements of the airgun sound source are conducted. The measurements will be made at the beginning of the field season and the measured radii used for the remainder of the survey period. An acoustics contractor will use their equipment to record and analyze the underwater sounds and write the summary reports as described below.

The objectives of the sound source verification measurements planned for 2011 in the Chukchi Sea will be to measure the distances at which broadband received levels reach 190, 180, 170, 160, and 120 dB_{rms} re 1 μPa for the airgun configurations that may be used during the survey activities. The configurations will include at least the full array (4 × 10 in^3) and the operation of a single 10 in^3 airgun that will be used during power downs or very shallow penetration surveys.

2011 Joint Environmental Studies Program

Statoil, Shell Offshore, Inc. (Shell), and CPAI are working on plans to once again jointly fund an extensive environmental studies program in the Chukchi Sea. This program is expected to be coordinated by Olgoonik-Fairweather LLC (OFJV) during the 2011 open-water season. The environmental studies program is not part of the Statoil site survey and soil investigations program, but acoustic monitoring equipment is planned to be deployed on and near Statoil leases and will therefore collect additional data on the sounds produced by the 2011 activities. The program components include:

• Acoustics Monitoring,
• Fisheries Ecology,
• Benthic Ecology,
• Plankton Ecology,
• Marine Mammal Surveys,
• Seabird Surveys, and
• Physical Oceanography.

The planned 2011 program will continue the acoustic monitoring programs carried out in 2006–2010. A similar number of acoustic recorders as deployed in past years will be distributed broadly across the Chukchi lease area and nearshore environment. In past years, clusters of recorders designed to localize marine mammal calls originating within or nearby the clusters have been deployed on each of the companies' prospects: Amundsen (Statoil), Burger (Shell), and Klondike (CPAI). This year, recorders from the clusters are planned to be relocated in a broader deployment on and around Hanna Shoal.

The recorders will be deployed in late July or mid-August and will be retrieved in early to mid-October, depending on

ice conditions. The recorders will be AMAR and AURAL model acoustic buoys set to record at 16 kHz sample rate. These are the same recorder models and same sample rates that have been used for this program from 2006–2010. The broad area arrays are designed to capture general background soundscape data, industrial sounds, and marine mammal call data across the lease area. From previous deployments of these recordings, industry has been able to gain insight into large-scale distributions of marine mammals, identification of marine mammal species present, movement and migration patterns, and general abundance data.

Reporting Measures

(1) SSV Report

A report on the preliminary results of the acoustic verification measurements, including as a minimum the measured 190-, 180-, 160-, and 120-dB_{rms} re 1 μPa radii of the source vessel(s) and the support vessels and the airgun array, will be submitted within 120 hr after collection and analysis of those measurements at the start of the field season. This report will specify the distances of the exclusion zones that were adopted for the marine survey activities.

(2) Field Reports

Statoil states that throughout the survey program, the observers will prepare a report each day or at such other interval as the IHA or Statoil may require, summarizing the recent results of the monitoring program. The field reports will summarize the species and numbers of marine mammals sighted. These reports will be provided to NMFS and to the survey operators.

(3) Technical Reports

The results of Statoil's 2011 vessel-based monitoring, including estimates of ''take'' by harassment, will be presented in the ''90-day'' and Final Technical reports. The Technical Reports will include:

(a) Summaries of monitoring effort (*e.g.,* total hours, total distances, and marine mammal distribution through the study period, accounting for sea state and other factors affecting visibility and detectability of marine mammals);

(b) Analyses of the effects of various factors influencing detectability of marine mammals (*e.g.,* sea state, number of observers, and fog/glare);

(c) Species composition, occurrence, and distribution of marine mammal sightings, including date, water depth, numbers, age/size/gender categories (if determinable), group sizes, and ice cover;

(d) To better assess impacts to marine mammals, data analysis should be separated into periods when a seismic airgun array (or a single mitigation airgun) is operating and when it is not. Final and comprehensive reports to NMFS should summarize and plot:

- Data for periods when a seismic array is active and when it is not; and
- The respective predicted received sound conditions over fairly large areas (tens of km) around operations;

(e) Sighting rates of marine mammals during periods with and without airgun activities (and other variables that could affect detectability), such as:

- Initial sighting distances versus airgun activity state;
- Closest point of approach versus airgun activity state;
- Observed behaviors and types of movements versus airgun activity state;
- Numbers of sightings/individuals seen versus airgun activity state;
- Distribution around the survey vessel versus airgun activity state; and
- Estimates of take by harassment;

(f) Reported results from all hypothesis tests should include estimates of the associated statistical power when practicable;

(g) Estimate and report uncertainty in all take estimates. Uncertainty could be expressed by the presentation of confidence limits, a minimum-maximum, posterior probability distribution, etc.; the exact approach would be selected based on the sampling method and data available;

(h) The report should clearly compare authorized takes to the level of actual estimated takes; and

(i) As a starting point for integrating different data sources, Statoil should present their 2010 and 2011 data by plotting acoustic detections from bottom-mounted hydrophone and visual detections from MMOs on a single map.

(4) Comprehensive Report

Following the 2011 open-water season, a comprehensive report describing the vessel-based and acoustic monitoring programs will be prepared. The comprehensive report will describe the methods, results, conclusions and limitations of each of the individual data sets in detail. The report will also integrate (to the extent possible) the studies into a broad based assessment of industry activities, other activities that occur in the Beaufort and/or Chukchi seas, and their impacts on marine mammals during 2011. The report will help to establish long-term data sets that can assist with the evaluation of changes in the Chukchi and Beaufort Sea ecosystems. The report will attempt to provide a regional synthesis of available data on industry activity in offshore areas of northern Alaska that may influence marine mammal density, distribution, and behavior.

(5) Notification of Injured or Dead Marine Mammals

In addition to the reporting measures proposed by Statoil, NMFS is requiring Statoil to notify NMFS' Office of Protected Resources and NMFS' Stranding Network within 48 hours of sighting an injured or dead marine mammal in the vicinity of marine survey operations. Statoil shall provide NMFS with the species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

In the event that an injured or dead marine mammal is found by Statoil that is not in the vicinity of the proposed open-water marine survey program, Statoil will report the same information as listed above as soon as operationally feasible to NMFS.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) Has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment]. Only take by Level B behavioral harassment is anticipated as a result of the proposed open-water marine survey program. Anticipated impacts to marine mammals are associated with noise propagation from the survey airgun(s) used in the shallow hazards survey.

The full suite of potential impacts to marine mammals was described in detail in the ''Potential Effects of the Specified Activity on Marine Mammals'' section found in the Notice of Proposed IHA (76 FR 30110; May 24, 2011). The potential effects of sound from the open-water marine survey programs might include one or more of the following: tolerance; masking of natural sounds; behavioral disturbance; non-auditory physical effects; and, at least in theory, temporary or permanent hearing impairment (Richardson *et al.* 1995). As

discussed earlier in this document, the most common impact will likely be from behavioral disturbance, including avoidance of the ensonified area or changes in speed, direction, and/or diving profile of the animal. For reasons discussed previously in this document, hearing impairment (TTS and PTS) is highly unlikely to occur based on the required mitigation and monitoring measures that would preclude marine mammals being exposed to noise levels high enough to cause hearing impairment.

For impulse sounds, such as those produced by airgun(s) used in the shallow hazards survey, NMFS uses the 160 dB_{rms} re 1 μPa isopleth to indicate the onset of Level B harassment. For non-impulse sounds, such as noise generated during the geotechnical soil investigation that involves drilling bore holes and running the dynamic positioning thruster of the vessel, NMFS uses the 120 dB_{rms} re 1 μPa isopleth to indicate the onset of Level B harassment. Statoil provided calculations for the 160- and 120-dB isopleths produced by these activities and then used those isopleths to estimate takes by harassment. NMFS used the calculations to make the necessary MMPA findings. Statoil provided a full description of the methodology used to estimate takes by harassment in its IHA application (see **ADDRESSES**), which was also provided in the Notice of Proposed IHA (76 FR 30110; May 24, 2011). A summary of that information is provided here, as it has not changed from the proposed notice.

Statoil has requested an authorization to take 13 marine mammal species by Level B harassment. These 13 marine mammal species are: beluga whale (*Delphinapterus leucas*), narwhal (*Monodon monoceros*), killer whale (*Orcinus orca*), harbor porpoise (*Phocoena phocoena*), bowhead whale (*Balaena mysticetus*), gray whale (*Eschrichtius robustus*), humpback whale (*Megaptera novaeangliae*), minke whale (*Balaenoptera acutorostrata*), fin whale (*B. physalus*), bearded seal (*Erignathus barbatus*), ringed seal (*Phoca hispida*), spotted seal (*P. largha*), and ribbon seal (*Histriophoca fasciata*).

Basis for Estimating ''Take by Harassment''

As stated previously, it is current NMFS policy to estimate take by Level B harassment for impulse sounds at a received level of 160 dB_{rms} re 1μPa. However, not all animals react to sounds at this low level, and many will not show strong reactions (and in some cases any reaction) until sounds are much stronger. Southall *et al.* (2007) provide a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of anthropogenic sound (see Table 4 in Southall *et al.* (2007)). Tables 7, 9, and 11 in Southall *et al.* (2007) outline the numbers of low-frequency cetaceans, mid-frequency cetaceans, and pinnipeds in water, respectively, reported as having behavioral responses to multi-pulses in 10-dB received level increments. These tables illustrate that for the studies summarized the more severe reactions did not occur until sounds were much higher than 160 dB_{rms} re 1μPa.

As described earlier in the document, a 4×10 in^3 airgun cluster will be used to obtain geological data during the site surveys. A similar airgun cluster was measured by Shell in 2009 during shallow hazards surveys on their nearby Burger prospect (Reiser *et al.* 2010). For use in estimating potential harassment takes in this application, as well as for mitigation radii to be implemented by PSOs prior to SSV measurements, ranges to threshold levels from the 2009 measurements were increased by 25% as a precautionary approach (Table 1). The ≥ 160 dB distance is therefore estimated to be 2.25 km (1.4 mi) from the source. Adding a 2.25 km (1.4 mi) perimeter to the two site survey areas results in an estimated area of 1,037 km^2 being exposed to ≥160 dB.

Geotechnical soil investigations on the Statoil leases and leases jointly owned with CPAI will involve completing 3–4 boreholes at up to 8 total prospective drilling locations for an expected maximum of 29 boreholes. The 3–4 boreholes completed at each drilling location will be positioned in a square or triangle formation, roughly 100 m (328 ft) on each side. As described earlier, the sounds produced by soil investigation equipment are estimated to fall below 120 dB at a distance of 7.5 km (4.7 mi). Buffering 4 core sites spaced 100 m (328 ft) apart with the 7.5 km (4.7 mi) 120 dB distance results in a total area of 180 km^2. The total area exposed to sounds ≥ 120 dB by soil investigations at the 8 prospective drilling locations will therefore be 1,440 km^2.

The following subsections summarize the estimated densities of marine mammals that may occur in the areas where activities are planned and areas of water that may be ensonified by pulsed sounds to ≥ 160 dB or non-pulsed sounds to ≥ 120 dB.

Marine mammal densities near the planned activities in the Chukchi Sea are likely to vary by season and habitat. Therefore, densities have been derived for two time periods, the summer period, including July and August, and the fall period, including September and October. Animal densities encountered in the Chukchi Sea during both of these time periods will further depend on whether they are occurring in open water or near the ice margin. Vessel and equipment limitations will result in very little activity occurring in or near sea ice, however, if ice is present near the areas of activity some sounds produced by the activities may remain above disturbance threshold levels in ice margin habitats. Therefore, open water densities have been used to estimate potential ''take by harassment'' in 90% of the area expected to be ensonified above disturbance thresholds while ice margin densities have been used in the remaining 10% of the ensonified area.

Detectability bias [f(0)] is associated with diminishing sightability with increasing lateral distance from the trackline. Availability bias [g(0)] refers to the fact that there is < 100% probability of sighting an animal that is present on the survey trackline. Some sources of densities used included these correction factors in their reported densities. In other cases the best available correction factors were applied to reported results when they had not been included in the reported analyses (*e.g.* Moore *et al.* 2000).

Tables 2 and 3 present the expected densities of marine mammals in the planned survey area for both open-water and ice-margin habitat in the summer and fall seasons, respectively.

(1) Cetaceans

Eight species of cetaceans are known to occur in the Chukchi Sea area of the Statoil project. Only four of these (bowhead, beluga, and gray whales, and harbor porpoise) are likely to be encountered during the survey activities. Three of the eight species (bowhead, fin, and humpback whales) are listed as endangered under the ESA. Of these, only the bowhead is likely to be found within the survey area.

Beluga Whales—Summer densities of belugas in offshore waters of the Chukchi Sea are expected to be low, with higher densities in ice-margin and nearshore areas. Aerial surveys have recorded few belugas in the offshore Chukchi Sea during the summer months (Moore *et al.* 2000). Aerial surveys of the Chukchi Sea in 2008–2009 flown by the NMML as part of the Chukchi Offshore Monitoring in Drilling Area project (COMIDA) have only reported 5 beluga sightings during > 14,000 km of on-transect effort, only 2 of which were

offshore (COMIDA 2009). If belugas are present during the summer, they are more likely to occur in or near the ice edge or close to shore during their northward migration. Effort and sightings reported by Clarke and Ferguson (in prep.) were used to calculate the average open-water density estimate.

In the fall, beluga whale densities in the Chukchi Sea are expected to be somewhat higher than in the summer because individuals of the eastern Chukchi Sea stock and the Beaufort Sea stock will be migrating south to their wintering grounds in the Bering Sea (Allen and Angliss 2010). Densities derived from survey results in the northern Chukchi Sea in Clarke and Ferguson (in prep.) were used as the average density for open-water fall season estimates (see Table 3). Based on the lack of any beluga sightings from vessels operating in the Chukchi Sea during non-seismic periods and locations in September-October of 2006–2008 (Haley *et al.* 2010), the relatively low densities shown in Table 3 are consistent with what is likely to be observed from vessels during the planned operations.

TABLE 2—EXPECTED DENSITIES OF CETACEANS AND SEALS IN AREAS OF THE CHUKCHI SEA, ALASKA, DURING THE PLANNED SUMMER (JULY–AUGUST) PERIOD OF THE SHALLOW HAZARDS SURVEY PROGRAM

Species	Open water average density (#/km^2)	Ice margin average density (#/km^2)
Beluga whale	0.0010	0.0040
Narwhal	0.0000	0.0000
Killer whale	0.0001	0.0001
Harbor porpoise	0.0011	0.0011
Bowhead whale	0.0013	0.0013
Fin whale	0.0001	0.0001
Gray whale	0.0258	0.0258
Humpback whale	0.0001	0.0001
Minke whale	0.0001	0.0001
Bearded seal	0.0107	0.0142
Ribbon seal	0.0005	0.0005
Ringed seal	0.3668	0.4891
Spotted seal	0.0073	0.0098

TABLE 3— EXPECTED DENSITIES OF CETACEANS AND SEALS IN AREAS OF THE CHUKCHI SEA, ALASKA, DURING THE PLANNED FALL (SEPTEMBER–OCTOBER) PERIOD OF THE SHALLOW HAZARDS SURVEY PROGRAM

Species	Open water average density (#/km^2)	Ice margin average density (#/km^2)
Beluga whale	0.0015	0.0060
Narwhal	0.0000	0.0000
Killer whale	0.0001	0.0001
Harbor porpoise	0.0001	0.0001
Bowhead whale	0.0219	0.0438
Fin whale	0.0001	0.0001
Gray whale	0.0080	0.0080
Humpback whale	0.0001	0.0001
Minke whale	0.0001	0.0001
Bearded seal	0.0107	0.0142
Ribbon seal	0.0005	0.0005
Ringed seal	0.2458	0.3277
Spotted seal	0.0049	0.0065

Bowhead Whales—By July, most bowhead whales are northeast of the Chukchi Sea, within or migrating toward their summer feeding grounds in the eastern Beaufort Sea. The estimate of summer bowhead whale density in the Chukchi Sea was calculated by assuming there was one bowhead sighting during the 11,985 km of survey effort in waters 36–50 m deep in the Chukchi Sea during July–August reported in Clarke and Ferguson (in prep.), although no bowheads were actually observed during those surveys. Bowheads are not expected to be encountered in higher densities near ice in the summer (Moore *et al.* 2000), so the same density estimates are used for open-water and ice-margin habitats. Densities from vessel based surveys in the Chukchi Sea during non-seismic periods and locations in July–August of 2006–2008 (Haley *et al.* 2010) ranged from 0.0001–0.0007/km^2 with a maximum 95 percent confidence interval (CI) of 0.0029/km^2. This suggests the densities used in the calculations and shown in Table 3 are somewhat higher than are likely to be observed from vessels near the area of planned operations.

During the fall, bowhead whales that summered in the Beaufort Sea and Amundsen Gulf migrate west and south to their wintering grounds in the Bering Sea, making it more likely that bowheads will be encountered in the Chukchi Sea at this time of year. Kernel densities estimated from GPS locations of whales suggest that bowheads do not spend much time (*e.g.,* feeding or resting) in the north-central Chukchi Sea near the area of planned activities (Quakenbush *et al.* 2010). Clarke and Ferguson (in prep.) reported 14 sightings (15 individuals) during 10,036 km of on transect aerial survey effort in

2008–2010. The mean group size from those sightings is 1.1. The same f(0) and g(0) values that were used for the summer estimates above were used for the fall estimates (Table 3). Moore *et al.* (2000) found that Bowheads were detected more often than expected in association with ice in the Chukchi Sea in September–October, so a density of twice the average open-water density was used as the average ice-margin density (Table 3). Densities from vessel based surveys in the Chukchi Sea during non-seismic periods and locations in September–October of 2006–2008 (Haley *et al.* 2010) ranged from 0.0003/km² to 0.0044/km² with a maximum 95 percent CI of 0.0419 km². This suggests the densities used in the calculations and shown in Table 3 are somewhat higher than are likely to be observed from vessels near the area of planned operations.

Gray Whales—Gray whale densities are expected to be much higher in the summer months than during the fall. The average open-water summer density (Table 2) was calculated from effort and sightings reported by Clarke and Ferguson (in prep.) for water depths 36–50 m including 54 sightings (73 individuals) during 11,985 km of on-transect effort. Gray whales are not commonly associated with sea ice, but may be present near it, so the same densities were used for ice-margin habitat as were derived for open-water habitat during both seasons. In the fall, gray whales may be dispersed more widely through the northern Chukchi Sea (Moore *et al.* 2000), but overall densities are likely to be decreasing as the whales begin migrating south. A density calculated from effort and sightings (15 sightings [19 individuals] during 10,036 km of on-transect effort) in water 36–50 m deep during September–October reported by Clarke and Ferguson (in prep.) was used as the average estimate for the Chukchi Sea during the fall period (Table 3).

Harbor Porpoise—Harbor Porpoise densities were estimated from industry data collected during 2006–2008 activities in the Chukchi Sea. Prior to 2006, no reliable estimates were available for the Chukchi Sea, and harbor porpoise presence was expected to be very low and limited to nearshore regions. Observers on industry vessels in 2006–2008, however, recorded sightings throughout the Chukchi Sea during the summer and early fall months. Density estimates from 2006–2008 observations during non-seismic periods and locations in July–August ranged from 0.0008/km² to 0.0015/km² with a maximum 95 percent CI of 0.0079/km² (Haley *et al.* 2010). The average of those three years (0.0011/km²) was used as the average open-water density estimate while the high value (0.0015/km²) was used as the maximum estimate (Table 2). Harbor porpoise are not expected to be present in higher numbers near ice, so the open-water densities were used for ice-margin habitat in both seasons. Harbor porpoise densities recorded during industry operations in the fall months of 2006–2008 were slightly lower than the summer months and ranged from 0.0002/km² to 0.0010/km² with a maximum 95 percent CI of 0.0093/km². The average of those three years (0.0001/km²) was again used as the average density estimate and the high value 0.0011/km² was used as the maximum estimate (Table 3).

Other Cetaceans—The remaining five cetacean species that could be encountered in the Chukchi Sea during Statoil's planned activities include the humpback whale, killer whale, minke whale, fin whale, and narwhal. Although there is evidence of the occasional occurrence of these animals in the Chukchi Sea, it is unlikely that more than a few individuals will be encountered during the planned activities. George and Suydam (1998) reported killer whales, Brueggeman *et al.* (1990) and Haley *et al.* (2010) reported minke whale, and COMIDA (2009) and Haley *et al.* (2010) reported fin whales. Narwhal sightings in the Chukchi Sea have not been reported in recent literature, but subsistence hunters occasionally report observations near Barrow, and Reeves *et al.* (2002) indicated a small number of extralimital sightings in the Chukchi Sea.

(2) Pinnipeds

Four species of pinnipeds may be encountered in the Chukchi Sea: Ringed seal, bearded seal, spotted seal, and ribbon seal. Each of these species, except the spotted seal, is associated with both the ice margin and the nearshore area. The ice margin is considered preferred habitat (as compared to the nearshore areas) during most seasons.

Ringed and Bearded Seals—Ringed seal and bearded seal summer ice-margin densities (Table 2) were taken from Bengtson *et al.* (2005) who conducted spring surveys in the offshore pack ice zone (zone 12P) of the northern Chukchi Sea. However, a correction for bearded seal availability bias, g(0), based on haulout and diving patterns was not available and used in the reported densities. Densities of ringed and bearded seals in open water are expected to be somewhat lower in the summer when preferred pack ice habitat may still be present in the Chukchi Sea. Average and maximum open-water densities have been estimated as ¾ of the ice margin densities during both seasons for both species. The fall density of ringed seals in the offshore Chukchi Sea has been estimated as ⅔ the summer densities because ringed seals begin to reoccupy nearshore fast ice areas as it forms in the fall. Bearded seals may also begin to leave the Chukchi Sea in the fall, but less is known about their movement patterns so fall densities were left unchanged from summer densities.

Spotted Seal—Little information on spotted seal densities in offshore areas of the Chukchi Sea is available. Spotted seal densities in the summer were estimated by multiplying the ringed seal densities by 0.02. This was based on the ratio of the estimated Chukchi populations of the two species.

Ribbon Seal—Two ribbon seal sightings were reported during industry vessel operations in the Chukchi Sea in 2006–2008 (Haley *et al.* 2010). The resulting density estimate of 0.0005/km² was used as the average density.

Potential Number of Takes by Harassment

This subsection provides estimates of the number of individuals potentially exposed to sound levels ≥ 160 dB_{rms} re 1 μPa by pulsed airgun sounds and to ≥ 120 dB_{rms} re 1 μPa by non-impulse sounds during geotechnical soil investigations. The estimates are based on a consideration of the number of marine mammals that might be disturbed appreciably by operations in the Chukchi Sea and the anticipated area exposed to those sound levels.

The number of individuals of each species potentially exposed to received levels of pulsed sounds ≥ 160 dB_{rms} re 1 μPa or to ≥ 120 dB_{rms} re 1 μPa by continuous sounds within each season and habitat zone was estimated by multiplying:

- The anticipated area to be ensonified to the specified level in each season and habitat zone to which that density applies, by
- The expected species density.

The numbers of individuals potentially exposed were then summed for each species across the two seasons and habitat zones. Some of the animals estimated to be exposed, particularly migrating bowhead whales, might show avoidance reactions before being exposed to pulsed airgun sounds ≥ 160 dB_{rms} re 1 μPa. Thus, these calculations actually estimate the number of individuals potentially exposed to the specified sound levels that would occur

if there were no avoidance of the area ensonified to that level.

Site survey and geotechnical soil investigations are planned to occur primarily in August and September, with the potential to continue into mid-November, if necessary and weather permitting. For the purposes of assigning activities to the summer (August) and fall (September–October) periods for which densities have been estimated above, NMFS has assumed that half of the operations will occur during the summer period and half will occur in the fall period. Additionally, the planned activities cannot be completed in or near significant amounts of sea ice, so 90% of the activity each season (and associated ensonified areas) has been multiplied by the open-water densities described above, while the remaining 10% of activity has been multiplied by the ice-margin densities.

Species with an estimated average number of individuals exposed equal to zero are included below for completeness, but are not likely to be encountered.

(1) Shallow Hazards and Site Clearance Surveys

The estimated numbers of marine mammals potentially exposed to airgun sounds with received levels ≥ 160 dB_{rms} from site surveys on Statoil's leases are shown in Table 4. The average estimate of the number of individual bowhead whales exposed to received sound levels ≥ 160 dB is 11. The average estimate for gray whales is slightly greater at 18, while few belugas are expected to be exposed (Table 4). Few other cetaceans (such as narwhal, harbor porpoise, killer, humpback, fin, and minke whales) are likely to be exposed to airgun sounds ≥ 160 dB, but estimates have been included to account for chance encounters.

Ringed seals are expected to be the most abundant animal in the Chukchi Sea during this period, and the average estimate of the number exposed to ≥ 160 dB by site survey activities is 337 (Table 4). Estimated exposures of other seal species are substantially below those for ringed seals (Table 4).

TABLE 4—SUMMARY OF THE NUMBER OF MARINE MAMMALS IN AREAS WHERE MAXIMUM RECEIVED SOUND LEVELS IN THE WATER WOULD BE ≥ 160 DB IN SUMMER (AUG) AND FALL (SEP–OCT) PERIODS DURING STATOIL'S PLANNED SITE SURVEYS IN THE CHUKCHI SEA, ALASKA. NOT ALL MARINE MAMMALS ARE EXPECTED TO CHANGE THEIR BEHAVIOR WHEN EXPOSED TO THESE SOUND LEVELS

Species	Number of individuals exposed to sound levels ≥ 160 dB				
	Summer		Fall		Total
	Open water	Ice margin	Open water	Ice margin	
Beluga whale	0	0	1	0	2
Narwhal	0	0	0	0	2
Killer whale	0	0	0	0	2
Harbor porpoise	1	0	0	0	1
Bowhead whale	1	0	10	0	11
Gray whale	12	1	4	1	18
Humpback whale	0	0	0	0	2
Fin whale	0	0	0	0	2
Minke whale	0	0	0	0	2
Bearded seal	5	1	5	1	12
Ribbon seal	0	0	0	0	1
Ringed seal	171	25	115	25	337
Spotted seal	3	1	2	1	7

(2) Geotechnical Soil Investigations

The estimated numbers of marine mammals potentially exposed to continuous sounds with received levels ≥ 120 dB_{rms} from geotechnical soil investigations on Statoil's leases and jointly owned leases are shown in Table 5. The average estimate of the number of individual bowhead whales exposed to received sound levels ≥ 120 dB is 15. The average estimate for gray whales is slightly larger at 26 individuals (Table 5). Few other cetaceans (such as narwhal, harbor porpoise, killer, humpback, fin, and minke whales) are likely to be exposed to soil investigation sounds ≥ 120 dB, but estimates have been included to account for chance encounters.

The average estimate of the number of ringed seals potentially exposed to ≥ 120 dB by soil investigation activities is 467 (Table 5). Estimated exposures of other seal species are substantially below those for ringed seals (Table 5).

TABLE 5—SUMMARY OF THE NUMBER OF MARINE MAMMALS IN AREAS WHERE MAXIMUM RECEIVED SOUND LEVELS IN THE WATER WOULD BE ≥ 120 DB IN SUMMER (AUG) AND FALL (SEP–OCT) PERIODS DURING STATOIL'S PLANNED GEOTECHNICAL SOIL INVESTIGATIONS IN THE CHUKCHI SEA, ALASKA. NOT ALL MARINE MAMMALS ARE EXPECTED TO CHANGE THEIR BEHAVIOR WHEN EXPOSED TO THESE SOUND LEVELS

Species	Number of individuals exposed to sound levels ≥ 120 dB				
	Summer		Fall		Total
	Open water	Ice margin	Open water	Ice margin	
Beluga whale	1	0	1	0	2
Narwhal	0	0	0	0	3
Killer whale	0	0	0	0	3
Harbor porpoise	1	0	0	0	1

TABLE 5—SUMMARY OF THE NUMBER OF MARINE MAMMALS IN AREAS WHERE MAXIMUM RECEIVED SOUND LEVELS IN THE WATER WOULD BE ≥ 120 dB IN SUMMER (AUG) AND FALL (SEP–OCT) PERIODS DURING STATOIL'S PLANNED GEOTECHNICAL SOIL INVESTIGATIONS IN THE CHUKCHI SEA, ALASKA. NOT ALL MARINE MAMMALS ARE EXPECTED TO CHANGE THEIR BEHAVIOR WHEN EXPOSED TO THESE SOUND LEVELS—Continued

Species	Number of individuals exposed to sound levels ≥ 120 dB				
	Summer		Fall		Total
	Open water	Ice margin	Open water	Ice margin	
Bowhead whale	1	0	14	0	15
Gray whale	17	2	5	2	26
Humpback whale	0	0	0	0	3
Fin whale	0	0	0	0	3
Minke whale	0	0	0	0	3
Bearded seal	7	1	7	1	16
Ribbon seal	0	0	0	0	1
Ringed seal	238	35	159	35	467
Spotted seal	5	1	3	1	10

Estimated Take Conclusions

Cetaceans—Effects on cetaceans are generally expected to be restricted to avoidance of an area around the seismic survey and short-term changes in behavior, falling within the MMPA definition of ''Level B harassment''.

Using the 160 and 120 dB criteria, the average estimates of the numbers of individual cetaceans exposed to received levels higher than these sound pressure levels represent varying proportions of the populations of each species in the Beaufort Sea and adjacent waters. For species listed as ''Endangered'' under the ESA, the estimates include approximately 26 bowheads. This number is approximately 0.18% of the Bering–Chukchi–Beaufort population of > 14,247 assuming 3.4% annual population growth from the 2001 estimate of > 10,545 animals (Zeh and Punt 2005). For other cetaceans that might occur in the vicinity of the shallow hazards survey in the Chukchi Sea, they also represent a very small proportion of their respective populations. The average estimates of the number of belugas, killer whales, harbor porpoises, gray whales, humpback whales, fin whales, and minke whales that might be exposed to ≥160 dB and 120 dB re 1 μPa are 4, 5, 2, 44, 5, 5, and 5. These numbers represent 0.11%, 1.59%, 0.004%, 0.25%, 0.53%, 0.09%, and 0.50% of these species of their respective populations in the proposed action area. No population estimates of narwhal are available in U.S. waters due to its extralimital distribution here. The world population of narwhal is estimated at 75,000 (Laidre *et al.* 2008), and most of them are concentrated in the fjords and inlets of Northern Canada and western Greenland. The estimated take of 5 narwhals represents approximately 0.01% of its population.

Seals—A few seal species are likely to be encountered in the study area, but ringed seal is by far the most abundant in this area. The average estimates of the numbers of individuals exposed to sounds at received levels ≥ 160 and 120 dB_{rms} re 1 μPa during the proposed shallow hazards survey and geotechnical soil investigation are as follows: Ringed seals (803), bearded seals (28), spotted seals (17), and ribbon seals (2). These numbers represent 0.35%, 0.01%, 0.03%, and 0.002% of Alaska stocks of ringed, bearded, spotted, and ribbon seals, respectively.

Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

No injuries or mortalities are anticipated to occur as a result of Statoil's proposed 2011 open water marine shallow hazards surveys in the Chukchi Seas, and none are authorized. In addition, these surveys would use a small 40 in^3 airgun array and several mid- to high-frequency active acoustic sources. The acoustic power output is much lower than full scale airgun arrays used in a 2D or 3D seismic survey and thus generates much lower source levels. The modeled isopleths at 160 dB is expected to be less than 2.25 km (1.4 mi) from the airgun source (see discussion earlier). Additionally, animals in the area are not expected to incur hearing impairment (*i.e.,* TTS or PTS) or non-auditory physiological effects. Takes will be limited to Level B behavioral harassment. Although it is possible that some individuals of marine mammals may be exposed to sounds from shallow hazards survey activities more than once, the expanse of these multi-exposures are expected to be less extensive since both the animals and the survey vessels will be moving constantly in and out of the survey areas.

Most of the bowhead whales encountered during the summer will likely show overt disturbance (avoidance) only if they receive airgun sounds with levels ≥ 160 dB re 1 μPa. Odontocete reactions to seismic energy pulses are usually assumed to be limited to shorter distances from the airgun(s) than are those of mysticetes, probably in part because odontocete low-frequency hearing is assumed to be less sensitive than that of mysticetes. However, at least when in the Canadian Beaufort Sea in summer, belugas appear to be fairly responsive to seismic energy, with few being sighted within 6–12 mi (10–20 km) of seismic vessels during aerial surveys (Miller *et al.* 2005). Belugas will likely occur in small numbers in the Chukchi Sea during the survey period, and few will likely be affected by the survey activity. In addition, due to the constant moving of the survey vessel, the duration of the noise exposure by cetaceans to seismic impulse would be brief. For the same reason, it is unlikely that any individual animal would be exposed to high received levels multiple times.

For animals exposed to machinery noise from geotechnical soil investigations, NMFS considers that at received levels ≥ 120 dB re 1 μPa, the animals could respond behaviorally in a manner that NMFS considers Level B harassment due to the non-pulse nature of the noise involved in this activity. During soil investigation operations, the most intensive noise source is from the DP system that automatically controls and coordinates vessel movements using bow and/or stern thrusters. Measurements of a similar vessel in DP mode in the Chukchi Sea in 2010 provided an estimated source level at about 176 dB re 1 μPa, which is below what NMFS uses to assess Level A harassment of received levels at 180 dB for cetaceans and 190 dB for pinnipeds. Therefore, no hearing impairment is anticipated. In addition, the duration of the entire geotechnical soil investigation is approximately 14 days, and DP will only be running sporadically when needed to position the vessel. In addition, the soil investigation operations are expected to be stationary, with limited area to be ensonified. Therefore, the impacts to marine mammals in the vicinity of the soil investigation operations are expected to be in short duration and localized.

Taking into account the mitigation measures that are required to be implemented, effects on cetaceans are generally expected to be restricted to avoidance of a limited area around the survey operation and short-term changes in behavior, falling within the MMPA definition of ''Level B harassment''. Furthermore, the estimated numbers of animals potentially exposed to sound levels sufficient to cause appreciable disturbance are very low percentages of the population sizes in the Bering–Chukchi–Beaufort seas, as described above.

The many reported cases of apparent tolerance by cetaceans of seismic exploration, vessel traffic, and some other human activities show that co-existence is possible. Mitigation measures such as controlled vessel speed, dedicated PSOs, non-pursuit, and shut downs or power downs when marine mammals are seen within defined ranges, will further reduce short-term reactions and minimize any effects on hearing sensitivity. In all cases, the effects are expected to be short-term, with no lasting biological consequence.

Some individual pinnipeds may be exposed to sound from the marine surveys more than once during the time frame of the project. However, as discussed previously, due to the constant moving of the survey vessel, the probability of an individual pinniped being exposed to sound multiple times is much lower than if the source is stationary. Therefore, NMFS has determined that the exposure of pinnipeds to sounds produced by the shallow hazards surveys and soil investigation in the Chukchi Sea is not expected to result in more than Level B harassment and is anticipated to have no more than a negligible impact on the animals.

Of the thirteen marine mammal species likely to occur in the marine survey area, only the bowhead, fin, and humpback whales are listed as endangered under the ESA. These species are also designated as ''depleted'' under the MMPA. Despite these designations, the Bering-Chukchi-Beaufort stock of bowheads has been increasing at a rate of 3.4 percent annually for nearly a decade (Allen and Angliss 2010). Additionally, during the 2001 census, 121 calves were counted, which was the highest yet recorded. The calf count provides corroborating evidence for a healthy and increasing population (Allen and Angliss 2010). The occurrence of fin and humpback whales in the marine survey areas is considered very rare. There is no critical habitat designated in the U.S. Arctic for the bowhead, fin, and humpback whale. On December 10, 2010, NMFS published a notification of proposed threatened status for subspecies of the ringed seal (75 FR 77476) and a notification of proposed threatened and not warranted status for subspecies and distinct population segments of the bearded seal (75 FR 77496) in the **Federal Register**. Neither species is considered depleted under the MMPA. The listing for these species is not anticipated to be completed prior to the end of this proposed seismic survey. None of the other species that may occur in the project area are listed as threatened or endangered under the ESA or designated as depleted under the MMPA.

Potential impacts to marine mammal habitat were discussed previously in this document (see the ''Anticipated Effects on Habitat'' section). Although some disturbance is possible to food sources of marine mammals, the impacts are anticipated to be minor enough as to not affect rates of recruitment or survival of marine mammals in the area. Based on the vast size of the Arctic Ocean where feeding by marine mammals occurs versus the localized area of the marine survey activities, any missed feeding opportunities in the direct project area would be minor based on the fact that other feeding areas exist elsewhere.

The estimated authorized takes represent 0.11% of the Eastern Chukchi Sea population of approximately 3,710 beluga whales (Allen and Angliss 2010), 1.59% of Aleutian Island and Bering Sea stock of approximately 314 killer whales, 0.004% of Bering Sea stock of approximately 48,215 harbor porpoises, 0.25% of the Eastern North Pacific stock of approximately 17,752 gray whales, 0.18% of the Bering-Chukchi-Beaufort population of 14,247 bowhead whales assuming 3.4 percent annual population growth from the 2001 estimate of 10,545 animals (Zeh and Punt, 2005), 0.53% of the Western North Pacific stock of approximately 938 humpback whales, 0.09% of the North Pacific stock of approximately 5,700 fin whales, and 0.50% of the Alaska stock of approximately 1,003 minke whales. The take estimates presented for bearded, ringed, spotted, and ribbon seals represent 0.01, 0.35, 0.03, and 0.002 percent of U.S. Arctic stocks of each species, respectively. These estimates represent the percentage of each species or stock that could be taken by Level B behavioral harassment if each animal is taken only once. In addition, the mitigation and monitoring measures (described previously in this document) required in the IHA are expected to reduce even further any potential disturbance to marine mammals.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that Statoil's 2011 open-water shallow hazards survey in the Chukchi Sea may result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the marine surveys will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

Relevant Subsistence Uses

The disturbance and potential displacement of marine mammals by sounds from the proposed marine surveys are the principal concerns related to subsistence use of the area. Subsistence remains the basis for Alaska Native culture and community. Subsistence hunting and fishing continue to be prominent in the household economies and social welfare of some Alaskan residents, particularly among those living in small, rural

villages (Wolfe and Walker 1987). In rural Alaska, subsistence activities are often central to many aspects of human existence, including patterns of family life, artistic expression, and community religious and celebratory activities. Additionally, the animals taken for subsistence provide a significant portion of the food that will last the community throughout the year. The main species that are hunted include bowhead and beluga whales, ringed, spotted, and bearded seals, walruses, and polar bears. (Both the walrus and the polar bear are under the USFWS' jurisdiction.) The importance of each of these species varies among the communities and is largely based on availability.

Bowhead whales, belugas, and walruses are the marine mammal species primarily harvested during the time of Statoil's shallow hazards survey. There is little or no bowhead hunting by the community of Point Lay, so beluga and walrus hunting are of more importance there. Members of the Wainwright community hunt bowhead whales in the spring, although bowhead whale hunting conditions there are often more difficult than elsewhere, and they do not hunt bowheads during seasons when Statoil's survey operation would occur. Depending on the level of success during the spring bowhead hunt, Wainwright residents may be very dependent on the presence of belugas in a nearby lagoon system during July and August. Barrow residents focus hunting efforts on bowhead whales during the spring and generally do not hunt beluga then. However, Barrow residents also hunt in the fall, when Statoil expects to be conducting shallow hazards surveys (though not near Barrow).

(1) Bowhead Whales

Bowhead whale hunting is a key activity in the subsistence economies of northwest Arctic communities. An overall quota system for the hunting of bowhead whales was established by the International Whaling Commission (IWC) in 1977. The quota is now regulated through an agreement between NMFS and the AEWC. The AEWC allots the number of bowhead whales that each whaling community may harvest annually (USDI/BLM 2005). The annual take of bowhead whales has varied due to (a) Changes in the allowable quota level and (b) year-to-year variability in ice and weather conditions, which strongly influence the success of the hunt.

Bowhead whales migrate around northern Alaska twice each year, during the spring and autumn, and are hunted in both seasons. Bowhead whales are hunted from Barrow during the spring, and the fall migration and animals are not successfully harvested every year. The spring hunt along Chukchi villages and at Barrow occurs after leads open due to the deterioration of pack ice; the spring hunt typically occurs from early April until the first week of June. The fall migration of bowhead whales that summer in the eastern Beaufort Sea typically begins in late August or September. Fall migration into Alaskan waters is primarily during September and October.

In the fall, subsistence hunters use aluminum or fiberglass boats with outboards. Hunters prefer to take bowheads close to shore to avoid a long tow during which the meat can spoil, but Braund and Moorehead (1995) report that crews may (rarely) pursue whales as far as 50 mi (80 km). The autumn bowhead hunt usually begins in Barrow in mid-September, and mainly occurs in the waters east and northeast of Point Barrow.

The scheduling of this shallow hazard survey has been discussed with representatives of those concerned with the subsistence bowhead hunt, most notably the AEWC, the Barrow Whaling Captains' Association, and the North Slope Borough (NSB) Department of Wildlife Management.

The planned mobilization and start date for shallow hazards surveys in the Chukchi Sea (~25 July and ~1 August, respectively) is well after the end of the spring bowhead migration and hunt at Wainwright and Barrow. Shallow hazards survey and soil investigation operations will be conducted far offshore from Barrow and Wainwright and are not expected to conflict with subsistence hunting activities. Specific concerns of the Barrow whaling captains are addressed as part of the Plan of Cooperation discussed below.

(2) Beluga Whales

Beluga whales are available to subsistence hunters along the coast of Alaska in the spring when pack-ice conditions deteriorate and leads open up. Belugas may remain in coastal areas or lagoons through June and sometimes into July and August. The community of Point Lay is heavily dependent on the hunting of belugas in Kasegaluk Lagoon for subsistence meat. From 1983–1992 the average annual harvest was ~40 whales (Fuller and George 1997). In Wainwright and Barrow, hunters usually wait until after the spring bowhead whale hunt is finished before turning their attention to hunting belugas. The average annual harvest of beluga whales taken by Barrow for 1962–1982 was five (MMS 1996). The Alaska Beluga Whale Committee recorded that 23 beluga whales had been harvested by Barrow hunters from 1987 to 2002, ranging from 0 in 1987, 1988 and 1995 to the high of 8 in 1997 (Fuller and George 1997; Alaska Beluga Whale Committee 2002 in USDI/BLM 2005). The seismic survey activities take place well offshore, far away from areas that are used for beluga hunting by the Chukchi Sea communities. Additionally, Statoil's mobilization date is after the usual completion date of the spring beluga hunt in Kasegaluk Lagoon (*i.e.,* July 15 for end date of the hunt).

(3) Ringed Seals

Ringed seals are hunted mainly from October through June. Hunting for these smaller mammals is concentrated during winter because bowhead whales, bearded seals, and caribou are available during other seasons. In winter, leads and cracks in the ice off points of land and along the barrier islands are used for hunting ringed seals. The average annual ringed seal harvest was 49 seals in Point Lay, 86 in Wainwright, and 394 in Barrow (Braund *et al.* 1993; USDI/BLM 2003; 2005). Although ringed seals are available year-round, the planned activities will not occur during the primary period when these seals are typically harvested. Also, the activities will be largely in offshore waters where the activities will not influence ringed seals in the nearshore areas where they are hunted.

(4) Spotted Seals

The spotted seal subsistence hunt peaks in July and August along the shore where the seals haul out but usually involves relatively few animals. Spotted seals typically migrate south by October to overwinter in the Bering Sea. During the fall migration, spotted seals are hunted by the Wainwright and Point Lay communities as the seals move south along the coast (USDI/BLM 2003). Spotted seals are also occasionally hunted in the area off Point Barrow and along the barrier islands of Elson Lagoon to the east (USDI/BLM 2005). The planned activities will remain offshore of the coastal harvest area of these seals and should not conflict with harvest activities.

(5) Bearded Seals

Bearded seals, although generally not favored for their meat, are important to subsistence activities in Barrow and Wainwright, because of their skins. Six to nine bearded seal hides are used by whalers to cover each of the skin-covered boats traditionally used for spring whaling. Because of their valuable hides and large size, bearded seals are specifically sought. Bearded

seals are harvested during the spring and summer months in the Chukchi Sea (USDI/BLM 2003; 2005). The animals inhabit the environment around the ice floes in the drifting nearshore ice pack, so hunting usually occurs from boats in the drift ice. Most bearded seals are harvested in coastal areas inshore of the survey, so no conflicts with the harvest of bearded seals are expected.

In the event that both marine mammals and hunters are near the areas of planned operations, the project potentially could impact the availability of marine mammals for harvest in a small area immediately around the vessel, in the case of pinnipeds, and possibly in a large area in the case of migrating bowheads. However, the majority of marine mammals are taken by hunters within ~21 mi (~33 km) from shore, and the survey activities will occur far offshore, well outside the hunting areas. Considering the timing and location of the shallow hazards survey activities, as described earlier in the document, the project is not expected to have any significant impacts to the availability of marine mammals for subsistence harvest. Specific concerns of the respective communities are addressed as part of the Plan of Cooperation between Statoil and the AEWC.

Potential Impacts to Subsistence Uses

NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as:

> * * * an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Noise and general activity during Statoil's open-water shallow hazards survey have the potential to impact marine mammals hunted by Native Alaskans. In the case of cetaceans, the most common reaction to anthropogenic sounds (as noted previously in this document) is avoidance of the ensonified area. In the case of bowhead whales, this often means that the animals divert from their normal migratory path by several kilometers. Additionally, general vessel presence in the vicinity of traditional hunting areas could negatively impact a hunt.

In the case of subsistence hunts for bowhead whales in the Chukchi Sea, there could be an adverse impact on the hunt if the whales were deflected seaward (further from shore) in traditional hunting areas. The impact would be that whaling crews would have to travel greater distances to intercept westward migrating whales, thereby creating a safety hazard for whaling crews and/or limiting chances of successfully striking and landing bowheads.

In addition, Native knowledge indicates that bowhead whales become increasingly ''skittish'' in the presence of seismic noise. Whales are more wary around the hunters and tend to expose a much smaller portion of their back when surfacing (which makes harvesting more difficult). Additionally, natives report that bowheads exhibit angry behaviors in the presence of seismic, such as tail-slapping, which translate to danger for nearby subsistence harvesters.

Plan of Cooperation (POC or Plan)

Regulations at 50 CFR 216.104(a)(12) require IHA applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes.

Statoil states that it intends to maintain an open and transparent process with all stakeholders throughout the life-cycle of activities in the Chukchi Sea. Statoil began the stakeholder engagement process in 2009 with meeting Chukchi Sea community leaders at the tribal, city, and corporate level. Statoil will continue to engage with leaders, community members, and subsistence groups, as well as local, state, and federal regulatory agencies throughout the exploration and development process.

As part of stakeholder engagement, Statoil developed a POC for the 2011 activities. The POC summarizes the actions Statoil will take to identify important subsistence activities, inform subsistence users of the proposed survey activities, and obtain feedback from subsistence users regarding how to promote cooperation between subsistence activities and the Statoil program.

During the early phase of the POC process for the project, Statoil met with the North Slope Borough Department of Wildlife Management (Dec 2010) and the AEWC (mini-convention in Barrow, Feb 2011). Statoil also arranged to visit and hold public meetings in the affected Chukchi Sea villages, including Pt. Hope, Pt. Lay, Wainwright, and Barrow during the week of March 21, 2011.

Based upon these meetings, a final POC that documents all consultations with community leaders, subsistence user groups, individual subsistence users, and community members was submitted to NMFS on July 14, 2011. Subsistence mitigation measures that Statoil will implement during the shallow hazards survey program were described in the Mitigation Measures section earlier in this document.

Unmitigable Adverse Impact Analysis and Determination

NMFS has determined that Statoil's proposed 2011 open water shallow hazards survey in the Chukchi Sea will not have an unmitigable adverse impact on the availability of species or stocks for taking for subsistence uses. This determination is supported by information contained in this document and Statoil's POC. Statoil has adopted a spatial and temporal strategy for its Chukchi Sea operations that should minimize impacts to subsistence hunters. Statoil will enter the Chukchi Sea far offshore, so as to not interfere with July hunts in the Chukchi Sea villages, if they are still ongoing. After the close of the July beluga whale hunts in the Chukchi Sea villages, very little whaling occurs in Wainwright, Point Hope, and Point Lay. Although the fall bowhead whale hunt in Barrow will occur while Statoil is still operating (mid- to late September to October), Barrow is approximately 150 mi (241 km) east of the eastern boundary of the shallow hazards survey site. Because the whales are migrating westward from the Canadian Beaufort Sea, they will reach Barrow before entering the area of Statoil's activities. Based on these factors, Statoil's Chukchi Sea shallow hazards survey is not expected to interfere with the fall bowhead harvest in Barrow. In recent years, bowhead whales have occasionally been taken in the fall by coastal villages along the Chukchi coast, but the total number of these animals has been small.

Adverse impacts are not anticipated on sealing activities since the majority of hunts for seals occur in the winter and spring, when Statoil will not be operating. Additionally, most sealing activities occur much closer to shore than Statoil's shallow hazards survey area.

Based on the measures described in Statoil's POC, mitigation and monitoring measures (described earlier in this document), and the project design itself, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses of marine mammals from Statoil's open-water

shallow hazards survey in the Chukchi Sea.

Endangered Species Act (ESA)

There are three marine mammal species listed as endangered under the ESA with confirmed or possible occurrence in the project area: The bowhead, humpback, and fin whales. NMFS' Permits, Conservation and Education Division consulted with NMFS' Protected Resources Division under section 7 of the ESA on the issuance of an IHA to Statoil under section 101(a)(5)(D) of the MMPA for this activity. A Biological Opinion was issued on July 22, 2011, which concludes that issuance of an IHA is not likely to jeopardize the continued existence of the fin, humpback, or bowhead whale. NMFS has issued an Incidental Take Statement under this Biological Opinion which contains reasonable and prudent measures with implementing terms and conditions to minimize the effects of take of listed species.

National Environmental Policy Act (NEPA)

In 2010, NMFS prepared an EA and issued FONSIs for open-water seismic and marine surveys in the Beaufort and Chukchi seas by Shell and Statoil. A review of Statoil's proposed 2011 open-water shallow hazards surveys indicates that the planned action is essentially the same as the marine survey conducted by Shell in 2010, but on a smaller scale. In addition, the review indicated that there is no significant change in the environmental baselines from those analyzed in 2010. Therefore, NMFS has prepared a Supplemental EA which incorporates by reference the 2010 EA and other related documents and updates the activity to reflect the lower impacts compared to the previous season. A FONSI was issued for this action on July 21, 2011. Therefore, preparation of an EIS is not necessary.

Authorization

As a result of these determinations, NMFS has issued an IHA to Statoil to take marine mammals incidental to its 2011 open-water shallow hazards and geotechnical surveys in the Chukchi Sea, Alaska, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: July 28, 2011.

Helen Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–19663 Filed 8–2–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA571

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Coastal Commercial Fireworks Displays at Monterey Bay National Marine Sanctuary, CA

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application for letter of authorization; request for comments and information.

SUMMARY: NMFS has received a request from the Monterey Bay National Marine Sanctuary (MBNMS or sanctuary) for authorization to take small numbers of marine mammals incidental to permitting professional fireworks displays within the sanctuary in California waters, over the course of five years, from July 4, 2012 to July 3, 2017. Pursuant to regulations implementing the Marine Mammal Protection Act (MMPA), NMFS is announcing receipt of MBNMS's request for the development and implementation of regulations governing the incidental taking of marine mammals and inviting information, suggestions, and comments on MBNMS's application and request.

DATES: Comments and information must be received no later than September 2, 2011.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing e-mail comments is *ITP.Laws@noaa.gov.* Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

A copy of MBNMS's application may be obtained by writing to the address specified above (see **ADDRESSES**), telephoning the contact listed above (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 et seq.) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

On April 28, 2011, NMFS received a complete application from MBNMS requesting authorization for take of two species of marine mammals incidental to coastal fireworks displays conducted at MBNMS under permits issued by MBNMS. NMFS first issued an incidental harassment authorization (IHA) to MBNMS on July 4, 2005 (70 FR 39235; July 7, 2005), and subsequently issued 5-year regulations governing the annual issuance of Letters of Authorization under section 101 (a)(5)(A) of the MMPA (71 FR 40928; July 19, 2006). Upon expiration of those regulations, NMFS issued MBNMS an IHA (76 FR 29196; May 20, 2011), which expires on July 3, 2012. The requested regulations would be valid from July 4, 2012 until July 3, 2017. Marine mammals would be exposed to

elevated levels of sound as a result of permitted fireworks displays, as well as increased human activity associated with those displays. Because the specified activities have the potential to take marine mammals present within the action area, MBNMS requests authorization to take, by Level B harassment only, California sea lions (*Zalophus californianus*) and harbor seals (*Phoca vitulina*).

Specified Activities

Since 1993, the MBNMS, a component of NOAA's Office of National Marine Sanctuaries, has processed requests for the professional display of fireworks that affect the sanctuary. The MBNMS has determined that debris fallout (i.e., spent pyrotechnic materials) from fireworks events may constitute a discharge into the sanctuary and thus violate sanctuary regulations, unless a permit is issued by the superintendent. Therefore, sponsors of fireworks displays conducted in the MBNMS are required to obtain sanctuary authorization prior to conducting such displays (see 15 CFR 922.132).

Authorization of professional firework displays has required a steady refinement of policies and procedures related to this activity. Fireworks displays, and the attendant increase in human activity, are known to result in the behavioral disturbance of pinnipeds, although there is no known instance of this disturbance resulting in more than temporary abandonment of haul-outs. As a result, pinnipeds hauled out in the vicinity of permitted fireworks displays may exhibit behavioral responses that indicate incidental take by Level B harassment under the MMPA. Numbers of California sea lions and harbor seals, the species that may be subject to harassment, have been recorded extensively at four regions where fireworks displays are permitted in MBNMS.

From 1993 through 2010, MBNMS has issued 87 permits for professional fireworks. However, the MBNMS staff projects that as many as 20 coastal displays per year may be conducted in, or adjacent to, MBNMS boundaries in the future. Thus, the number of displays would be limited to not more than 20 events per year in four specific areas along 276 mi (444 km) of coastline. Fireworks displays would not exceed 30 minutes (with the exception of up to two displays per year, each not to exceed one hour) in duration and would occur with an average frequency of less than or equal to once every 2 months within each of the four prescribed display areas. NMFS believes—and extensive monitoring data indicates—that incidental take resulting from fireworks displays causes, at most, the short-term flushing and evacuation of non-breeding haul-out sites by California sea lions and harbor seals.

MBNMS' four designated display areas include Half Moon Bay, the Santa Cruz/Soquel area, the northeastern Monterey Peninsula, and Cambria (Santa Rosa Creek). This effectively limits permitted fireworks displays to approximately five percent of the MBNMS coastline.

A more detailed description of the fireworks displays permitted by MBNMS may be found in MBNMS' application, in MBNMS' Assessment of Pyrotechnic Displays and Impacts within the MBNMS 1993–2001 (2001), or in the report of Marine Mammal Acoustic and Behavioral Monitoring for the MBNMS Fireworks Display, 4 July 2007 (2007), which are available at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

Information Solicited

Interested persons may submit information, suggestions, and comments concerning MBNMS's request (see **ADDRESSES**). All information, suggestions, and comments related to MBNMS's request and NMFS' potential development and implementation of regulations governing the incidental taking of marine mammals by MBNMS will be considered by NMFS in developing, if appropriate, regulations governing the issuance of letters of authorization.

Dated: July 29, 2011.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–19664 Filed 8–2–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 11–32]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 11–32 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: July 28, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

JUL 26 2011

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 11-32, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance to Poland for defense articles and services estimated to cost $200 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Richard A. Genaille, Jr.

Richard A. Genaille, Jr.
Deputy Director

Enclosures:
1. Transmittal
2. Policy Justification

BILLING CODE 5001–06–C

Transmittal No. 11–32, Notice of Proposed Issuance of Letter of Offer, Pursuant to Section 36(b)(1) Of the Arms Export Control Act, as amended.

(i) *Prospective Purchaser:* Poland

(ii) *Total Estimated Value:*

Major Defense Equipment:* $45 million

Other: *$155 million*

TOTAL: $200 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* provides follow-on technical support and a Service Life Extension Program for the upgrade and conversion of MK15 PHALANX Close-In Weapon Systems (CIWS) aboard two ex-FFG–7 Class Frigates from the Block 0 to Block 1B, Baseline 2 configuration, spare and repair parts, support and test equipment, publications and technical documentation, system overhauls and upgrades, personnel training and training equipment, U.S. Government and contractor technical support, and other related elements of program support.

(iv) *Military Department:* Navy (LAR)

(v) *Prior Related Cases:*

FMS case GAD-$6M–23Mar00

FMS case GAL-$10M–18Apr02

(vi) *Sales Commission, Fee, etc., Paid, offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* None

(viii) *Date Report Delivered to Congress:* 26 July 2011

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Poland—Service Life Extension Program for ex-FFG–7 Class Frigates

The Government of Poland has requested a possible sale to provide follow-on technical support and a

Service Life Extension Program for the upgrade and conversion of MK15 PHALANX Close-In Weapon Systems (CIWS) aboard two ex-FFG–7 Class Frigates from the Block 0 to Block 1B, Baseline 2 configuration, spare and repair parts, support and test equipment, publications and technical documentation, system overhauls and upgrades, personnel training and training equipment, U.S. Government and contractor technical support, and other related elements of program support. The estimated cost is $200 million.

Poland is one of our important allies in Northern Europe, contributing to NATO activities and ongoing U.S. interests in the pursuit of peace and stability. Poland's efforts in peacekeeping operations in Iraq and Afghanistan have served U.S. national security interests. It is vital to the U.S. national interest to assist Poland to develop and maintain a strong and ready self-defense capability.

The proposed sale will improve Poland's capability to meet current and future operational needs. Poland already has the capability to maintain the current Frigates and will have no difficulty absorbing the upgraded shipboard systems into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The proposed sale will involve multiple contractors, as well as U.S. Atlantic Coast shipyards who will compete for planning and execution of the system overhaul and upgrade projects. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to Poland. However, periodic travel to Poland will be required on a temporary basis in conjunction with program, technical, and management oversight and support requirements.

There will be no adverse impact on the U.S. defense readiness as a result of this proposed sale.

[FR Doc. 2011–19557 Filed 8–2–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Strategic Environmental Research and Development Program (SERDP), Scientific Advisory Board

AGENCY: Department of Defense, Office of the Secretary.

ACTION: Notice.

SUMMARY: This Notice is published in accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463). The topic of the meeting on September 14, 2011 is to review new start research and development projects related to the Munitions Response and Resource Conservation and Climate Change program areas. These projects are requesting Strategic Environmental Research and Development Program funds in excess of $1M. This meeting is open to the public. Any interested person may attend, appear before, or file statements with the Scientific Advisory Board at the time and in the manner permitted by the Board.

DATES: Wednesday, September 14, 2011 from 9 a.m. to 3 p.m.

ADDRESSES: SERDP Office Conference Center, 901 North Stuart Street, Suite 804, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan Bunger, SERDP Office, 901 North Stuart Street, Suite 303, Arlington, VA or by telephone at (703) 696–2126.

Dated: July 29, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–19662 Filed 8–2–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Meeting of the Department of Defense Military Family Readiness Council (MFRC)

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, Department of Defense.

ACTION: Notice.

SUMMARY: Pursuant to Section 10(a), Public Law 92–463, as amended, notice is hereby given of a forthcoming meeting of the Department of Defense Military Family Readiness Council (MFRC). The purpose of the Council meeting is to review the military family programs which will be the focus for the Council for next year, review the status of warrior care, and address selected concerns of military family organizations.

The meeting is open to the public, subject to the availability of space. Persons desiring to attend may contact Ms. Melody McDonald at 571–256–1738 or e-mail *FamilyReadinessCouncil@osd.mil* no later than 5 p.m. on Monday, September 12, 2011 to arrange for parking and escort into the conference room inside the Pentagon.

Interested persons may submit a written statement for consideration by the Council. Persons desiring to submit a written statement to the Council must notify the point of contact listed below no later than 5 p.m., Wednesday, September 14, 2011.

DATES: September 19, 2011, 2 p.m.–4 p.m.

ADDRESSES: Pentagon Conference Center B6 (escorts will be provided from the Pentagon Metro entrance).

FOR FURTHER INFORMATION CONTACT: Ms. Melody McDonald or Ms. Betsy Graham, Office of the Deputy Under Secretary (Military Community & Family Policy), 4000 Defense Pentagon, Room 2E319, Washington, DC 20301–4000. Telephones (571) 256–1738; (703) 697–9283 and/or e-mail: *FamilyReadinessCouncil@osd.mil.*

SUPPLEMENTARY INFORMATION: Meeting agenda.

Monday, 19 September 2011

Welcome & Administrative Remarks.

Review and Comment on Council Action from December meeting.

Priority Areas Briefings.

Intentions for the 2011 activities and meetings.

Closing Remarks.

Note: Exact order may vary.

Dated: July 28, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–19553 Filed 8–2–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2011–OS–0083]

Privacy Act of 1974; System of Records

AGENCY: Missile Defense Agency, Department of Defense (DoD).

ACTION: Notice to Delete a System of Records.

SUMMARY: The Missile Defense Agency proposes to delete a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on September 2, 2011 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is of make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Peter Shearston, Missile Defense Agency, MDA/DXCM, 730 Irwin Ave, Schriever AFB, CO 80912–2101, or by phone at 719–721–9865.

SUPPLEMENTARY INFORMATION: The Missile Defense Agency systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The Missile Defense Agency proposes to delete a system of records notice from its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed deletion is not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: July 28, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

Deletion
MDA 01

SYSTEM NAME:

Missile Defense Data Center Catalog System Records (December 15, 2008, 73 FR 76009)

REASON:

This system of records application does not store, process, nor transmit PII information and should no longer be registered as a system of record for PII purposes, therefore can be deleted.

[FR Doc. 2011–19613 Filed 8–2–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2011–OS–0080]

Privacy Act of 1974; System of Records; Correction

AGENCY: Department of Defense (DoD), Office of the Secretary.

ACTION: Notice to alter a system of records; correction.

SUMMARY: On July 21, 2011 (76 FR 43666–43673), DoD published a notice announcing its intent to alter a Privacy Act System of Records. Routine use number 22 a. was incorrectly written. This notice corrects that error.

DATES: Effective August 3, 2011.

FOR FURTHER INFORMATION CONTACT: Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155, *telephone:* (703) 588–6830.

SUPPLEMENTARY INFORMATION: On July 21, 2011, DoD published a notice announcing its intent to alter a system in its inventory of Privacy Act System of Records: Defense Enrollment Eligibility Recording System (DEERS). Subsequent to the publication of that notice, DoD discovered that the routine use on page 43669 was incorrectly published.

Correction

In the notice (FR Doc. 2011–18397) published on July 21, 2011, (76 FR 43666–43673) make the following correction. On page 43672, in the second column, replace paragraph 22 a. with ''Providing all Reserve Component military members to be matched against the Federal agencies for identifying those Reserve military members that are also Federal civil service employees with eligibility for the Federal Employees Health Benefits (FEHB) program. This disclosure by the Federal agencies will provide the DoD with the FEHB eligibility and Federal employment information necessary to determine initial and continuing eligibility for the TRICARE Reserve Select (TRS) program and the TRICARE Retired Reserve (TRR) program (collectively referred to as purchased TRICARE programs). Reserve Component members who are not eligible for FEHB are eligible for TRS (section 1076d of title 10) or TRR (section 1076e of title 10).''

Dated: July 26, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–19552 Filed 8–2–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Renewal of Department of Defense Federal Advisory Committees

AGENCY: Department of Defense (DoD), Office of the Secretary.

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972, (5 U.S.C. Appendix), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), and 41 CFR 102–3.50(d), the Department of Defense gives notice that it is renewing the charter for the Defense Policy Board (hereafter referred to as the ''Board'').

The Board is a discretionary Federal advisory committee that shall provide the Secretary of Defense and the Deputy Secretary of Defense, through the Under Secretary of Defense (Policy), independent, informed advice and opinion concerning matters of defense policy.

The Board shall focus on: (a) Issues central to strategic DoD planning; (b) policy implications of U.S. force structure and force modernization and on DoD's ability to execute U.S. defense strategy; (c) U.S. regional defense policies; and (d) any other research and analysis of topics raised by the Secretary of Defense, the Deputy Secretary or the Under Secretary of Defense (Policy).

The Under Secretary of Defense (Policy) may act upon the Board's advice and recommendations.

The Board shall be comprised of no more than twenty-eight members who have distinguished backgrounds in defense and national security affairs.

Board members appointed by the Secretary of Defense, who are not full-time or permanent part-time Federal employees, shall be appointed as experts and consultants under the authority of 5 U.S.C. 3109 and shall serve as special government employee members. Board members shall serve a term of two years on the Board and, with the Secretary of Defense's approval, may serve additional terms; however, the Secretary of Defense shall renew their appointments on an annual basis.

All Board members are appointed to provide advice on behalf of the

government on the basis of their best judgment without representing any particular point of view and in a manner that is free from conflict of interest.

The Secretary of Defense shall select the Board's Chairperson from the membership at large. In addition, the Secretary of Defense appoints the chairpersons of the Defense Business Board and the Defense Science Board as non-voting ex-officio members of the Defense Policy Board and their appointments shall not count toward the Board's total membership.

With the exception of travel and per diem for official travel, Board members shall serve without compensation.

The Under Secretary of Defense for Policy, according to DoD policies and procedures, may appoint experts and consultants as subject matter experts under the authority of 5 U.S.C. 3109 to advise the Board or its subcommittees; these individuals do not count toward the Board's total membership nor do they have voting privileges. In addition, these subject matter experts, when appointed, shall not participate in any discussions dealing with the substantive matters before the Board or its subcommittees unless the Secretary of Defense or the Deputy Secretary of Defense specifically invites them to participate in the deliberations according to DoD policies and procedures.

With DoD approval, the Board is authorized to establish subcommittees, as necessary and consistent with its mission. These subcommittees shall operate under the provisions of the Federal Advisory Committee Act of 1972, the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), and other governing Federal regulations.

Such subcommittees shall not work independently of the chartered Board, and shall report all their recommendations and advice to the Board for full deliberation and discussion.

Subcommittees have no authority to make decisions on behalf of the chartered Board; nor can they report directly to the Department of Defense or any Federal officers or employees who are not Board members.

Subcommittee members, who are not Board members, shall be appointed in the same manner as the Board members. Such individuals, if not full-time or part-time government employees, shall be appointed to serve as experts and consultants under the authority of 5 U.S.C. 3109, and serve as special government employees, whose appointments must be renewed by the Secretary of Defense on an annual basis. With the exception of travel and per diem for official travel, subcommittee members shall serve without compensation.

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Deputy Advisory Committee Management Officer for the Department of Defense, 703–601–6128.

SUPPLEMENTARY INFORMATION: The Board shall meet at the call of the Board's Designated Federal Officer, in consultation with the Board's Chairperson. The estimated number of Board meetings is four per year.

In addition, the Designated Federal Officer is required to be in attendance at all Board and subcommittee meetings for the entire duration of each and every meeting; however, in the absence of the Designated Federal Officer, the Alternate Designated Federal Officer shall attend the entire duration of the Board or subcommittee meeting.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to Defense Policy Board's membership about the Board's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of Defense Policy Board.

All written statements shall be submitted to the Designated Federal Officer for the Defense Policy Board, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Defense Policy Board Designated Federal Officer can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Defense Policy Board. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: July 28, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–19554 Filed 8–2–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Revised Non-Foreign Overseas Per Diem Rates

AGENCY: DoD, Per Diem, Travel and Transportation Allowance Committee.

ACTION: Notice of Revised Non-Foreign Overseas Per Diem Rates.

SUMMARY: The Per Diem, Travel and Transportation Allowance Committee is publishing Civilian Personnel Per Diem Bulletin Number 277. This bulletin lists revisions in the per diem rates prescribed for U.S. Government employees for official travel in Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands and Possessions of the United States. AEA changes announced in Bulletin Number 194 remain in effect. Bulletin Number 277 is being published in the **Federal Register** to assure that travelers are paid per diem at the most current rates.

DATES: *Effective Date:* August 1, 2011.

FOR FURTHER INFORMATION CONTACT: Mrs. Sonia Malik, 703–696–7369.

SUPPLEMENTARY INFORMATION: This document gives notice of revisions in per diem rates prescribed by the Per Diem Travel and Transportation Allowance Committee for non-foreign areas outside the continental United States. It supersedes Civilian Personnel Per Diem Bulletin Number 276. Distribution of Civilian Personnel Per Diem Bulletins by mail was discontinued. Per Diem Bulletins published periodically in the **Federal Register** now constitute the only notification of revisions in per diem rates to agencies and establishments outside the Department of Defense. For more information or questions about per diem rates, please contact your local travel office. The text of the Bulletin follows: The changes in Civilian Bulletin 277 are updated rates for Alaska.

Dated: July 26, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
ALASKA						
[OTHER]						
01/01 - 12/31	110		96		206	2/1/2011
ADAK						
01/01 - 12/31	120		79		199	7/1/2003
ANCHORAGE [INCL NAV RES]						
05/01 - 09/15	181		104		285	2/1/2011
09/16 - 04/30	99		96		195	2/1/2011
BARROW						
01/01 - 12/31	159		95		254	10/1/2002
BETHEL						
01/01 - 12/31	157		99		256	7/1/2011
BETTLES						
01/01 - 12/31	135		62		197	10/1/2004
CLEAR AB						
01/01 - 12/31	90		82		172	10/1/2006
COLDFOOT						
01/01 - 12/31	165		70		235	10/1/2006
COPPER CENTER						
09/16 - 05/14	95		95		190	1/1/2011
05/15 - 09/15	139		99		238	1/1/2011
CORDOVA						
01/01 - 12/31	95		130		225	1/1/2011
CRAIG						
10/01 - 03/31	151		80		231	2/1/2011
04/01 - 09/30	236		89		325	2/1/2011
DELTA JUNCTION						
05/01 - 09/30	145		65		210	1/1/2011
10/01 - 04/30	115		64		179	1/1/2011
DENALI NATIONAL PARK						
06/01 - 08/31	135		88		223	1/1/2011

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
09/01 - 05/31	90		84		174	1/1/2011
DILLINGHAM						
05/15 - 10/15	185		111		296	1/1/2011
10/16 - 05/14	169		109		278	1/1/2011
DUTCH HARBOR-UNALASKA						
01/01 - 12/31	121		99		220	2/1/2011
EARECKSON AIR STATION						
01/01 - 12/31	90		77		167	6/1/2007
EIELSON AFB						
05/05 - 09/15	175		107		282	1/1/2011
09/16 - 05/04	75		98		173	1/1/2011
ELFIN COVE						
01/01 - 12/31	200		45		245	8/1/2010
ELMENDORF AFB						
05/01 - 09/15	181		104		285	2/1/2011
09/16 - 04/30	99		96		195	2/1/2011
FAIRBANKS						
05/05 - 09/15	175		107		282	1/1/2011
09/16 - 05/04	75		98		173	1/1/2011
FOOTLOOSE						
01/01 - 12/31	175		18		193	10/1/2002
FT. GREELY						
05/01 - 09/30	145		65		210	1/1/2011
10/01 - 04/30	115		64		179	1/1/2011
FT. RICHARDSON						
05/01 - 09/15	181		104		285	2/1/2011
09/16 - 04/30	99		96		195	2/1/2011
FT. WAINWRIGHT						
05/05 - 09/15	175		107		282	1/1/2011
09/16 - 05/04	75		98		173	1/1/2011
GAMBELL						
01/01 - 12/31	105		39		144	1/1/2011
GLENNALLEN						
05/15 - 09/15	139		99		238	1/1/2011

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
09/16 - 05/14	95		95		190	1/1/2011
HAINES						
01/01 - 12/31	107		101		208	1/1/2011
HEALY						
06/01 - 08/31	135		88		223	1/1/2011
09/01 - 05/31	90		84		174	1/1/2011
HOMER						
05/15 - 09/15	167		117		284	1/1/2011
09/16 - 05/14	79		115		194	1/1/2011
JUNEAU						
05/16 - 09/15	149		99		248	8/1/2011
09/16 - 05/15	135		98		233	8/1/2011
KAKTOVIK						
01/01 - 12/31	165		86		251	10/1/2002
KAVIK CAMP						
01/01 - 12/31	150		69		219	10/1/2002
KENAI-SOLDOTNA						
05/01 - 08/31	179		96		275	8/1/2011
09/01 - 04/30	79		86		165	8/1/2011
KENNICOTT						
01/01 - 12/31	259		115		374	2/1/2011
KETCHIKAN						
05/01 - 09/30	140		90		230	2/1/2011
10/01 - 04/30	99		86		185	2/1/2011
KING SALMON						
05/01 - 10/01	225		91		316	10/1/2002
10/02 - 04/30	125		81		206	10/1/2002
KLAWOCK						
04/01 - 09/30	236		89		325	2/1/2011
10/01 - 03/31	151		80		231	2/1/2011
KODIAK						
05/01 - 09/30	141		120		261	2/1/2011
10/01 - 04/30	99		117		216	2/1/2011
KOTZEBUE						

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
01/01	- 12/31	189		114		303	2/1/2011
KULIS AGS							
05/01	- 09/15	181		104		285	2/1/2011
09/16	- 04/30	99		96		195	2/1/2011
MCCARTHY							
01/01	- 12/31	259		115		374	2/1/2011
MCGRATH							
01/01	- 12/31	165		69		234	10/1/2006
MURPHY DOME							
05/05	- 09/15	175		107		282	1/1/2011
09/16	- 05/04	75		98		173	1/1/2011
NOME							
01/01	- 12/31	150		126		276	2/1/2011
NUIQSUT							
01/01	- 12/31	180		53		233	10/1/2002
PETERSBURG							
01/01	- 12/31	110		96		206	2/1/2011
POINT HOPE							
01/01	- 12/31	200		49		249	1/1/2011
POINT LAY							
01/01	- 12/31	225		51		276	8/1/2011
PORT ALEXANDER							
01/01	- 12/31	150		43		193	8/1/2010
PORT ALSWORTH							
01/01	- 12/31	135		88		223	10/1/2002
PRUDHOE BAY							
01/01	- 12/31	170		68		238	1/1/2011
SELDOVIA							
09/16	- 05/14	79		115		194	1/1/2011
05/15	- 09/15	167		117		284	1/1/2011
SEWARD							
10/01	- 04/30	85		96		181	2/1/2011
05/01	- 09/30	172		106		278	2/1/2011
SITKA-MT. EDGECUMBE							

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
05/01	- 09/30	119		114		233	2/1/2011
10/01	- 04/30	99		112		211	2/1/2011
SKAGWAY							
05/01	- 09/30	140		90		230	2/1/2011
10/01	- 04/30	99		86		185	2/1/2011
SLANA							
10/01	- 04/30	99		55		154	2/1/2005
05/01	- 09/30	139		55		194	2/1/2005
SPRUCE CAPE							
05/01	- 09/30	141		120		261	2/1/2011
10/01	- 04/30	99		117		216	2/1/2011
ST. GEORGE							
01/01	- 12/31	129		55		184	6/1/2004
TALKEETNA							
01/01	- 12/31	100		89		189	10/1/2002
TANANA							
01/01	- 12/31	150		126		276	2/1/2011
TOK							
05/01	- 09/30	89		129		218	2/1/2011
10/01	- 04/30	71		126		197	2/1/2011
UMIAT							
01/01	- 12/31	350		35		385	10/1/2006
VALDEZ							
09/16	- 04/30	119		111		230	2/1/2011
05/01	- 09/15	189		120		309	2/1/2011
WAINWRIGHT							
01/01	- 12/31	175		83		258	1/1/2011
WASILLA							
10/01	- 04/30	99		103		202	2/1/2011
05/01	- 09/30	153		108		261	2/1/2011
WRANGELL							
05/01	- 09/30	140		90		230	2/1/2011
10/01	- 04/30	99		86		185	2/1/2011
YAKUTAT							

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
01/01 - 12/31	105		94		199	1/1/2011
AMERICAN SAMOA						
AMERICAN SAMOA						
01/01 - 12/31	139		122		261	12/1/2010
GUAM						
GUAM (INCL ALL MIL INSTAL)						
01/01 - 12/31	159		86		245	7/1/2011
HAWAII						
[OTHER]						
01/01 - 12/31	104		109		213	7/1/2011
CAMP H M SMITH						
01/01 - 12/31	177		116		293	7/1/2011
EASTPAC NAVAL COMP TELE AREA						
01/01 - 12/31	177		116		293	7/1/2011
FT. DERUSSEY						
01/01 - 12/31	177		116		293	7/1/2011
FT. SHAFTER						
01/01 - 12/31	177		116		293	7/1/2011
HICKAM AFB						
01/01 - 12/31	177		116		293	7/1/2011
HONOLULU						
01/01 - 12/31	177		116		293	7/1/2011
ISLE OF HAWAII: HILO						
01/01 - 12/31	104		109		213	7/1/2011
ISLE OF HAWAII: OTHER						
01/01 - 12/31	180		116		296	7/1/2011
ISLE OF KAUAI						
01/01 - 12/31	243		127		370	7/1/2011
ISLE OF MAUI						
01/01 - 12/31	169		120		289	7/1/2011
ISLE OF OAHU						
01/01 - 12/31	177		116		293	7/1/2011
KEKAHA PACIFIC MISSILE RANGE FAC						

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
01/01 - 12/31	243		127		370	7/1/2011
KILAUEA MILITARY CAMP						
01/01 - 12/31	104		109		213	7/1/2011
LANAI						
01/01 - 12/31	249		145		394	7/1/2011
LUALUALEI NAVAL MAGAZINE						
01/01 - 12/31	177		116		293	7/1/2011
MCB HAWAII						
01/01 - 12/31	177		116		293	7/1/2011
MOLOKAI						
01/01 - 12/31	131		97		228	7/1/2011
NAS BARBERS POINT						
01/01 - 12/31	177		116		293	7/1/2011
PEARL HARBOR						
01/01 - 12/31	177		116		293	7/1/2011
SCHOFIELD BARRACKS						
01/01 - 12/31	177		116		293	7/1/2011
WHEELER ARMY AIRFIELD						
01/01 - 12/31	177		116		293	7/1/2011
MIDWAY ISLANDS						
MIDWAY ISLANDS						
01/01 - 12/31	125		62		187	7/1/2011
NORTHERN MARIANA ISLANDS						
[OTHER]						
01/01 - 12/31	55		72		127	10/1/2002
ROTA						
01/01 - 12/31	130		93		223	7/1/2011
SAIPAN						
01/01 - 12/31	121		94		215	7/1/2011
TINIAN						
01/01 - 12/31	85		74		159	7/1/2011
PUERTO RICO						
[OTHER]						

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
01/01 - 12/31	62		57		119	10/1/2002
AGUADILLA						
01/01 - 12/31	124		113		237	9/1/2010
BAYAMON						
01/01 - 12/31	195		128		323	9/1/2010
CAROLINA						
01/01 - 12/31	195		128		323	9/1/2010
CEIBA						
01/01 - 12/31	210		141		351	11/1/2010
FAJARDO [INCL ROOSEVELT RDS NAVSTAT]						
01/01 - 12/31	210		141		351	11/1/2010
FT. BUCHANAN [INCL GSA SVC CTR, GUAYNABO]						
01/01 - 12/31	195		128		323	9/1/2010
HUMACAO						
01/01 - 12/31	210		141		351	11/1/2010
LUIS MUNOZ MARIN IAP AGS						
01/01 - 12/31	195		128		323	9/1/2010
LUQUILLO						
01/01 - 12/31	210		141		351	11/1/2010
MAYAGUEZ						
01/01 - 12/31	109		112		221	9/1/2010
PONCE						
01/01 - 12/31	149		87		236	9/1/2010
SABANA SECA [INCL ALL MILITARY]						
01/01 - 12/31	195		128		323	9/1/2010
SAN JUAN & NAV RES STA						
01/01 - 12/31	195		128		323	9/1/2010
VIRGIN ISLANDS (U.S.)						
ST. CROIX						
04/15 - 12/14	135		92		227	5/1/2006
12/15 - 04/14	187		97		284	5/1/2006
ST. JOHN						
04/15 - 12/14	163		98		261	5/1/2006
12/15 - 04/14	220		104		324	5/1/2006

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
ST. THOMAS						
04/15 - 12/14	240		105		345	5/1/2006
12/15 - 04/14	299		111		410	5/1/2006
WAKE ISLAND						
WAKE ISLAND						
01/01 - 12/31	145		42		187	7/1/2011

[FR Doc. 2011–19446 Filed 8–2–11; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2011–0019]

Privacy Act of 1974; System of Records

AGENCY: Department of the Army, DoD.

ACTION: Notice to Add a System of Records.

SUMMARY: The Department of the Army proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action would be effective without further notice on September 2, 2011 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.*

Follow the instructions for submitting comments.

- *Mail*: Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Leroy Jones, Department of the Army, Privacy Office, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22325–3905, or by phone at (703) 428–6185.

SUPPLEMENTARY INFORMATION: The Department of the Army notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on July 29, 2011 to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: July 29, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

A0350–1d

SYSTEM NAME:

ATLAS PRO Learning Suite.

SYSTEM LOCATION:

Commander, U.S. Army Training Center, Training Capability Manager—Army Training Information System (TCM–ATIS), 3308 Wilson Avenue (ATIC–SD), Fort Eustis, VA 23604–5166.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Military members of the Army, Navy, Marine Corps, Air Force, civilians employed by the U.S. Government; and approved foreign military personnel when assigned to exchange duty in the U.S. and enrolled in a resident course or Web enabled course delivered at a U.S. Army service school.

CATEGORIES OF RECORDS IN THE SYSTEM:

Distance learning course data to include name, Social Security Number (SSN), assigned foreign ID or passport number (for foreign military members), address; scheduling, testing, academic, graduation, personnel and attrition data. It will include Army Knowledge Online name and user identification.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 3013, Secretary of the Army; Army Regulation 350–1, Army Training and Leader Development; FM 70–0, Train the Force; and TRADOC Regulation 350–70, Systems Approach to Training Management Processes and Products; E.O. 9397 (SSN), as amended.

PURPOSE(S):

The ATLAS PRO Learning Suite provides a student management system that integrates Web-enabled courseware to support online certification and career management.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of the Army's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and/or electronic storage media.

RETRIEVABILITY:

Retrieved by Army Knowledge Online name and user identification.

SAFEGUARDS:

Computerized records maintained in a controlled area are accessible only to authorized personnel. Paper records are maintained in a controlled facility. Physical entry is restricted by the use of locks, guards, and is accessible only to authorized personnel. Physical and electronic access is restricted to designated individuals having a need-to-know in the performance of official duties and who are properly screened and cleared.

RETENTION AND DISPOSAL:

Records are kept in current file area until no longer needed for conducting business, then retired to Records Holding Area (RHA)/Army Electronic Archive (AEA). The RHA/AEA will retire the record to NRPC Annex, 1411 Boulder Drive, Rock City Industrial Center, Valmeyer, IL 62295–2603, when the record is 10 years old. National Records Personnel Center (NRPC) will destroy the record when 40 years old.

SYSTEM MANAGER(S) AND ADDRESS:

Commander, U.S. Army Training Center, Training Capability Manager—Army Training Information System (TCM–ATIS), 3308 Wilson Avenue (ATIC–SD), Fort Eustis, VA 23604–5166.

NOTIFICATION PROCEDURE:

Individuals seeking to determine if information about themselves is contained in this system should address written inquiries to the Commander, U.S. Army Training Support Center (ATIC), 3308 Wilson Avenue, Fort Eustis, VA 23604–5166.

For verification purposes, individual should provide their full name, Social Security Number (SSN), assigned foreign ID or passport number (for foreign military members), and any details which may assist in locating records, and their signature.

IN ADDITION, THE REQUESTOR MUST PROVIDE A NOTARIZED STATEMENT OR AND UNSWORN DECLARATION MADE IN ACCORDANCE WITH 28 U.S.C. 1747, IN THE FOLLOWING FORMAT:

IF EXECUTED OUTSIDE THE UNITED STATES:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

IF EXECUTED WITHIN THE UNITED STATES, ITS TERRITORIES, POSSESSIONS, OR COMMONWEALTHS:

'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Commander, U.S. Army Training Support Center (ATIC), 3308 Wilson Avenue, Fort Eustis, VA 23604–5166.

For verification purposes, individual should provide their full name, Social Security Number (SSN), assigned foreign ID or passport number (for foreign military members), and any details which may assist in locating records, and their signature.

IN ADDITION, THE REQUESTOR MUST PROVIDE A NOTARIZED STATEMENT OR AND UNSWORN DECLARATION MADE IN ACCORDANCE WITH 28 U.S.C. 1747, IN THE FOLLOWING FORMAT:

IF EXECUTED OUTSIDE THE UNITED STATES:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

IF EXECUTED WITHIN THE UNITED STATES, ITS TERRITORIES, POSSESSIONS, OR COMMONWEALTHS:

'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

CONTESTING RECORD PROCEDURES:

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340–21; 32 CFR part 505; or may be obtained from the system manager. Denial to amend records in this system can be made only by the Deputy Chief of Staff for Personnel in coordination with the Director of the ATLAS PRO Learning Suite.

RECORD SOURCE CATEGORIES:

Information is received from the individual, DoD staff, personnel, training systems, and faculty.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–19640 Filed 8–2–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment Request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before October 3, 2011.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: July 29, 2011.

Darrin A. King,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of Special Education and Rehabilitative Services

Type of Review: Extension.

Title of Collection: Case Service Report.

OMB Control Number: 1820–0508.

Agency Form Number(s): N/A.

Frequency of Responses: Annually.

Affected Public: State, Local or Tribal Government.

Total Estimated Number of Annual Responses: 80.

Total Estimated Number of Annual Burden Hours: 3,600.

Abstract: As required by Sections 13, 101(a)(10), 106 and 626 of the Rehabilitation Act, the data are submitted annually by state Vocational Rehabilitation (VR) agencies. The data contain personal and program-related characteristics, including economic outcomes of persons with disabilities whose service records are closed. The information is used to compute agency performance on standards and indicators mandated by Section 106 of the Act as well as to assess agency performance on other evaluative measures used in monitoring of VR grantees and for other program and research purposes.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4693. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–19683 Filed 8–2–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Minority Science and Engineering Improvement Program

AGENCY: Department of Education, Office of Postsecondary Education.

ACTION: Notice.

Overview Information: Minority Science and Engineering Improvement Program (MSEIP) Notice inviting applications for new awards for fiscal year (FY) 2011.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.120A.

Dates:

Applications Available: August 3, 2011.

Deadline for Transmittal of Applications: September 2, 2011.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The MSEIP is designed to effect long-range improvement in science and engineering education at predominantly minority institutions and to increase the flow of underrepresented ethnic minorities, particularly minority women, into scientific and technological careers.

Competitive Preference Priorities: This notice includes five competitive preference priorities. Competitive Preference Priorities 1 and 2 are from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486). Competitive Preference Priorities 3, 4, and 5 are from 34 CFR 637.31(c).

For FY 2011 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are competitive preference priorities.

Under 34 CFR 75.105(c)(2)(i), we award an additional two and one-half points to an application that meets either Competitive Preference Priority 1 or 2, or an additional five points to an application that meets both Competitive Preference Priorities 1 and 2.

Under 34 CFR 75.105(c)(2)(i), we will also award an additional five points to an application that meets Competitive Preference Priority 3. Under 34 CFR 75.105(c)(2)(ii), we give preference to an application that meets Competitive Preference Priority 4 and Competitive Preference Priority 5 over an application of comparable merit that does not meet these priorities.

These priorities are:

Competitive Preference Priority 1—Increasing Postsecondary Success

Projects that are designed to address the following priority area:

Increasing the number and proportion of high-need students (as defined in this notice) who persist in and complete college or other postsecondary education and training.

Competitive Preference Priority 2—Enabling More Data-Based Decision-Making

Projects that are designed to collect (or obtain), analyze, and use high-quality and timely data, including data on program participant outcomes, in accordance with privacy requirements (as defined in this notice), in the following priority area:

Improving postsecondary student outcomes relating to enrollment, persistence, and completion and leading to career success.

Note: Applicants seeking to address these competitive priorities must do so in the context of meeting all other program requirements, including those provisions requiring a focus on science and engineering education in the grants funded under this program.

Definitions: The following definitions are from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

High-need children and high-need students means children and students at risk of educational failure, such as children and students who are living in poverty, who are English learners, who are far below grade level or who are not on track to becoming college- or career-ready by graduation, who have left school or college before receiving, respectively, a regular high school diploma or a college degree or certificate, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who are pregnant or parenting teenagers, who have been incarcerated, who are new immigrants, or who have disabilities.

Privacy requirements means the requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and its implementing regulations in 34 CFR part 99, the Privacy Act, 5 U.S.C. 552a, as well as all applicable Federal, State and local requirements regarding privacy.

These priorities are competitive preference priorities based on 34 CFR 637.31(c).

Under 34 CFR 75.105(c)(2)(i), we will also award an additional five (5) points

to an application that meets Competitive Preference Priority 3. Under 34 CFR 75.105(c)(2)(ii), we give preference to an application that meets Competitive Preference Priority 4 and Competitive Preference Priority 5 over an application of comparable merit that does not meet these priorities.

These priorities are:

Competitive Preference Priority 3. Applications from institutions that have not received a MSEIP grant within five years prior to this competition.

Competitive Preference Priority 4. Applications from previous grantees with a proven record of success.

Competitive Preference Priority 5. Applications that contribute to achieving balance among funded projects with respect to—(a) geographic region; (b) academic discipline; and (c) project type.

Invitational Priorities: For FY 2011 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are invitational priorities. Under 34 CFR 75.105(c)(1), we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

Invitational Priority 1. Applications that focus on preparing K–12 students to enter into postsecondary programs in science, technology, engineering, or mathematics (STEM) fields; or applications that develop articulation agreements that facilitate students entering into postsecondary STEM fields.

Invitational Priority 2. Applications that focus directly on student learning and encourage and facilitate implementation of effective pedagogical approaches increase student retention and achievement in STEM fields.

Invitational Priority 3. Applications that focus on mentoring programs designed to increase the number of underrepresented students who graduate with STEM undergraduate or graduate degrees.

Program Authority: 20 U.S.C. 1067–1067k.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 82, 84, 85, 86, 97, 98, and 99; (b) The regulations for this program in 34 CFR part 637; (c) the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

Note: The regulations in 34 CFR Part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $3,035,168.

Contingent upon the appropriation and the quality of applications, we may make additional awards in FY 2012 from the list of unfunded applications from this competition.

Estimated Range of Awards: Institutional Project Grants: $150,000–$250,000. Special Project Grants: $100,000–$250,000. Cooperative Project Grants: $250,000–$300,000.

Estimated Average Size of Awards: Institutional Project Grants: $200,000. Special Project Grants: $175,000. Cooperative Project Grants: $275,000.

Maximum Awards: Institutional Project Grants: $250,000. Special Project Grants: $250,000. Cooperative Project Grants: $300,000. We will reject any application that proposes a budget exceeding the maximum award for a single budget period of 12 months. The Assistant Secretary for Postsecondary Education may change the maximum amounts through a notice published in the **Federal Register**.

Estimated Number of Awards: Institutional Project Grants: 12; Special Project Grants: 2; Cooperative Project Grants: 1.

Project Period: Up to 36 months.

III. Eligibility Information

Eligible Applicants: The eligibility of an applicant is dependent on the type of MSEIP grant. There are four types of MSEIP grants: Institutional projects, special projects, cooperative, and design.

Institutional project grants are grants that support the implementation of a comprehensive science improvement plan, which may include any combination of activities for improving the preparation of minority students for careers in science.

There are two types of special projects grants. There are special projects grants for which minority institutions are eligible. These special projects grants support activities that: (1) Improve quality training in science and engineering at minority institutions; or (2) enhance the minority institutions' general scientific research capabilities. There are also special projects grants for which all applicants are eligible. These special projects grants support activities that: (1) Provide a needed service to a group of eligible minority institutions; or (2) provide in-service training for project directors, scientists, and engineers from eligible minority institutions.

Cooperative project grants assist groups of nonprofit accredited colleges and universities to work together to conduct a science improvement program.

Design project grants assist minority institutions that do not have their own appropriate resources or personnel to plan and develop long-range science improvement programs. We will not award design project grants in the FY 2011 competition.

A. For institutional project grants, eligible applicants are limited to:

(1) Public and private nonprofit institutions of higher education that (A) Award baccalaureate degrees; and (B) are minority institutions;

(2) public or private nonprofit institutions of higher education that (A) Award associate degrees; and (B) are minority institutions that (i) Have a curriculum that includes science or engineering subjects; and (ii) enter into a partnership with public or private nonprofit institutions of higher education that award baccalaureate degrees in science and engineering.

B. For special projects grants for which minority institutions are eligible, eligible applicants are described in paragraph A.

C. For special projects grants for which all applicants are eligible, eligible applicants include those described in paragraph A, and

(1) Nonprofit science-oriented organizations, professional scientific societies, and institutions of higher education that award baccalaureate degrees that: (A) Provide a needed service to a group of minority institutions; or (B) provide in-service training to project directors, scientists, and engineers from minority institutions; or

(2) a consortia of organizations, that provide needed services to one or more minority institutions, the membership of which may include (A) Institutions of higher education which have a curriculum in science or engineering; (B) institutions of higher education that have a graduate or professional program in science or engineering; (C) research laboratories of, or under contract with, the Department of Energy, the Department of Defense or the National Institutes of Health; (D) relevant offices of the National Aeronautics and Space Administration, National Oceanic and Atmospheric Administration, National Science Foundation and National Institute of Standards and Technology; (E) quasi-governmental entities that have a significant scientific or engineering mission; or (F)institutions

of higher education that have State-sponsored centers for research in science, technology, engineering and mathematics.

D. For cooperative projects grants, eligible applicants are groups of nonprofit accredited colleges and universities whose primary fiscal agent is an eligible minority institution as defined in 34 CFR 637.4(b).

Note: As defined in 34 CFR 637.4(b), *minority institution* means an accredited college or university whose enrollment of a single minority group or a combination of minority groups exceeds 50 percent of the total enrollment.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application via the Internet at *Grants.gov.* If you do not have access to the Internet, please contact Bernadette M. Hence or Matthew Willis, U.S. Department of Education, 1990 K Street, NW., Washington, DC 20006–8517. *Telephone:* (202) 219–7038 or (202) 502–7598, respectively.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* Braille, large print, audiotape, or computer diskette) by contacting the program contact persons listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We have established a mandatory page limit for the application narrative of each type of MSEIP grant project as follows:

Institutional project grants: 40 pages;

Special projects grant application: 35 pages;

Cooperative project grant application: 50 pages.

You must limit the application narrative (Part III) to these established page limits, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1'' margins at the top, bottom, and both sides. Page numbers and a document identifier may be within the 1″ margin.
- Double space (no more than three lines per vertical inch) all text in the application narrative, *except* titles, headings, footnotes, quotations, references, captions, and all text in charts, tables, and graphs. These items may be single spaced; however, they will count toward the page limit.
- Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch). However, you may use a 10 point font in charts, tables, figures, and graphs.
- *Use one of the following fonts:* Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.
- If you use some but not all of the allowable space on a page, it will be counted as a full page in determining compliance with the page limit.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the budget justification; Part IV, the one-page abstract, the table of contents, the MSEIP Eligibility Certification Form, required letter(s) of commitment, evidence of partnerships, or the assurances and certifications. If you include any attachments or appendices not specifically requested, these items will be counted as part of the program narrative (Part III) for purposes of the page limit requirement. You must include your complete responses to the selection criteria in the program narrative.

We will reject your application if you exceed the page limit. We will also reject your application if you fail to provide the MSEIP Eligibility Certification Form.

3. *Submission Dates and Times:*

Applications Available: August 3, 2011.

Deadline for Transmittal of Applications: September 2, 2011.

Applications for grants under this program must be submitted electronically using the *Grants.gov* Apply site (*Grants.gov*). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the persons listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via *Grants.gov*, you must (1) Be designated by your organization as

an Authorized Organization Representative (AOR); and (2) register yourself with *Grants.gov* as an AOR. Details on these steps are outlined at the following *Grants.gov* Web page: *http://www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically *unless* you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the MSEIP, CFDA Number 84.120A, must be submitted electronically using the Governmentwide *Grants.gov* Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the MSEIP at *http://www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.120, not 84.120A).

Please note the following:

- When you enter the *Grants.gov* site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by *Grants.gov* are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the *Grants.gov* system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the *Grants.gov* system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from *Grants.gov,* we will notify you if we are rejecting your application because it was date and time stamped by the *Grants.gov* system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through *Grants.gov.*
- You should review and follow the Education Submission Procedures for submitting an application through *Grants.gov* that are included in the application package for this competition to ensure that you submit your application in a timely manner to the *Grants.gov* system. You can also find the Education Submission Procedures pertaining to *Grants.gov* under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from *Grants.gov* an automatic notification of receipt that contains a *Grants.gov* tracking number. (This notification indicates receipt by *Grants.gov* only, not receipt by the Department.) The Department then will retrieve your application from *Grants.gov* and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through *Grants.gov,* please contact the *Grants.gov* Support Desk, toll free, at 1–800–518–4726. You must obtain a *Grants.gov* Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the *Grants.gov* system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with *Grants.gov,* along with the *Grants.gov* Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the *Grants.gov* system. We will not grant you an extension if you failed to fully register to submit your application to *Grants.gov* before the application deadline date and time or if the technical problem you experienced is unrelated to the *Grants.gov* system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the *Grants.gov* system because—

- You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the *Grants.gov* system; and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Dr. Bernadette Hence, U.S. Department of Education, 1990 K Street, NW., Room 6032, Washington, DC 20006–8517. *Fax:* (202) 502–7861.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.120A), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.120A), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 637.32(a) through (j), and are as follows:

(a) Identification of need for the project (Total 5 points).

(b) Plan of operation (Total 15 points).

(c) Quality of key personnel (Total 10 points).

(d) Budget and cost effectiveness (Total 15 points).

(e) Evaluation plan (Total 15 points).

(f) Adequacy of resources (Total 5 points).

(g) Potential institutional impact of the project (Total 10 points).

(h) Institutional commitment to the project (Total 10 points).

(i) Expected Outcomes (Total 10 points).

(j) Scientific and educational value of the proposed project (Total 5 points).

Applicants must address each of the selection criteria. The total weight of the selection criteria is 100 points; the weight of each criterion is noted in parentheses.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

Additional factors we consider in selecting an application for an award are in 34 CFR 75.217.

Tiebreaker for Institutional, Special Project, and Cooperative Grants. If there are insufficient funds for all applications with the same total scores, applications will receive preference in the following order: first, applications that satisfy the requirement of Competitive Preference Priority 3; second, applications that satisfy the requirements of Competitive Preference Priority 4 in combination with Competitive Preference Priority 5; and third, applications that satisfy the requirements of Competitive Preference Priority 4.

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package

and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section in this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Secretary has established the following key performance measures for assessing the effectiveness of the MSEIP: (1) The percentage of change in the number of full-time, degree-seeking minority undergraduate students at the grantee's institution enrolled in the fields of engineering or physical or biological sciences, compared to the average minority enrollment in the same fields in the three-year period immediately prior to the beginning of the current grant; (2) the percentage of minority students enrolled at four-year minority-serving institutions in the fields of engineering or physical or biological sciences who graduate within six years of enrollment.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contacts

FOR FURTHER INFORMATION CONTACT: Dr. Bernadette M. Hence, U.S. Department of Education, 1990 K Street, NW., Washington, DC 20006–8517 by *telephone:* (202) 219–7038, or by *e-mail: Bernadette.Hence@ed.gov* or Matthew Willis by telephone at (202) 502–7598 or by *e-mail: Matthew.Willis@ed.gov,* U.S. Department of Education, 1990 K Street, NW., Washington, DC 20006–8517.

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* Braille, large print, audiotape, or computer diskette) on request to the program contact persons listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

Dated: July 29, 2011.

Eduardo M. Ochoa,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2011–19686 Filed 8–2–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Privacy Act of 1974; System of Records—Federal Student Aid Application File

AGENCY: Federal Student Aid, Department of Education.

ACTION: Notice of altered system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (Privacy Act), 5 United States Code (U.S.C.) 552a, the Acting Chief Operating Officer for Federal Student Aid (FSA) of the U.S. Department of Education (the Department) publishes this notice proposing to revise the system of records for the Federal Student Financial Aid Application File (18–11–01), 64 **Federal Register** (FR) 30159–30161 (June 4, 1999), as corrected by 64 FR 72384, 72407 (December 27, 1999), as corrected by 65 FR 11294–11295 (March 2, 2000), as corrected by 66 FR 18758 (April 11, 2001), as altered by 74 FR 68802–68808 (December 29, 2009). This system of records contains information provided by applicants for Title IV of the Higher Education Act of 1965, as amended, (HEA) program assistance, which is collected from the Free Application for Federal Student Aid (FAFSA). Among other purposes described in this notice, the information collected is maintained in order to determine an applicant's eligibility for the Federal student financial assistance programs authorized by Title IV of the HEA; make a loan, grant, or scholarship; and verify the identity of the applicant.

This altered system of records includes records on individuals who are applying for Title IV, HEA program assistance. The records contain individually identifying information about an applicant, including, but not limited to: An applicant's name, address, Social Security number (SSN), date of birth, citizenship status, status as a veteran, driver's license number, marital status, and income and asset information. This altered system also contains information provided by the parent(s) of a dependent applicant, including, but not limited to: Name, date of birth, marital status, SSN, highest level of schooling completed, e-mail address, and income and asset information. This altered system of records also contains information about spousal income and asset information of a married applicant.

This notice proposes to expand the categories of individuals on whom records are maintained, to add two new purposes to the system of records, to expand a programmatic routine use disclosure, and to add a new programmatic routine use disclosure that was inadvertently deleted when the system of records was last altered. The notice would expand the individuals covered by the system to include secondary school students about whom requesting entities, such as schools, local educational agencies, and other local and State agencies, submit

information (*e.g.,* name, date of birth, and zip code) to the Department in order for the Department to provide these entities with the student's FAFSA completion filing status to promote and encourage the student to apply for Title IV, HEA program assistance, State assistance, and aid awarded by institutions of higher education.

The notice also would add two new purposes to this system of records, which would specify that the purposes of the system are (1) to determine the eligibility of applicants for the award of State postsecondary education assistance and for the award of aid by eligible institutions of higher education or other entities designated by the Secretary and to administer those awards, and (2) to promote and encourage application for Title IV, HEA program assistance, State assistance, and aid awarded by institutions of higher education or other entities designated by the Secretary.

In addition, the notice proposes to expand a current programmatic routine use disclosure to permit the Department's disclosure of FAFSA completion information to a local educational agency (LEA) or secondary school where the student is or was enrolled, or other State, local, and private entities designated by the Secretary in order to facilitate and promote FAFSA completion. Specifically, a current programmatic routine use disclosure permits the Department to disclose a student's FAFSA filing status only to the student's LEA and secondary school in order to permit these entities to counsel the student about applying for financial aid and to offer the student assistance with the completion of the FAFSA. The Department proposes to expand this current programmatic routine use disclosure so that the Department may make disclosures for this same purpose to other local agencies, State agencies, and other entities designated by the Secretary in an effort to increase FAFSA completion rates within a State.

Finally, the Department proposes to add a new, programmatic routine use disclosure to the system that was inadvertently deleted when the system of records was last altered. This new routine use disclosure would permit the Department to disclose records from this system of records to State agencies, eligible institutions of higher education, and other entities designated by the Secretary in order to permit them to determine an applicant's eligibility for the award of State postsecondary education assistance or for the award of aid by eligible institutions of higher education or other entities designated by the Secretary and to administer those awards.

DATES: We must receive your comments on or before September 2, 2011.

The Department filed a report describing the altered system of records covered by this notice with the Chair of the Senate Committee on Homeland Security and Governmental Affairs, the Chair of the House Committee on Oversight and Government Reform, and the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB), on July 21, 2011. This altered system of records will become effective at the later date of—(1) The expiration of the 40-day period for OMB review on August 30, 2011; or (2) September 2, 2011, unless the system of records needs to be changed as a result of public comment or OMB review.

ADDRESSES: Address all comments about this altered system of records to: Director, Application Processing Division, Program Management Systems, Federal Student Aid, U.S. Department of Education, 830 First Street, NE., room 63C4, Union Center Plaza (UCP), Washington, DC 20202. If you prefer to send your comments by e-mail, use the following address: *comments@ed.gov.*

You must include the term ''Federal Student Aid Application File'' in the subject line of your electronic message.

During and after the comment period, you may inspect all public comments about this notice in room 63C5, Union Center Plaza (UCP), 6th floor, 830 First Street, NE., Washington, DC 20202 between the hours of 8:00 a.m. and 4:30 p.m., Washington, DC time, Monday through Friday except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Director, Application Processing Division, Program Management Systems, Federal Student Aid, U.S. Department of Education, 830 First Street, NE., room 63C4, UCP, Washington, DC 20202. Telephone: (202)377–3205. If you use a telecommunications device for the deaf (TDD), you can call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the contact person listed under this section.

SUPPLEMENTARY INFORMATION:

Introduction

The Privacy Act of 1974 (5 U.S.C. 552a(e)(4) and (11)) requires the Department to publish in the **Federal Register** this notice of an altered system of records. The Department's regulations implementing the Privacy Act are contained in the Code of Federal Regulations (CFR) in 34 CFR part 5b.

The Privacy Act applies to information about an individual that is maintained in a system of records from which information is retrieved by a unique identifier associated with the individual, such as a name or Social Security number (SSN). The information about each individual is called a ''record,'' and the system, whether manual or computer-based, is called a ''system of records.''

The Privacy Act requires each agency to publish a system of records notice in the **Federal Register** and to submit, whenever the agency publishes a new system of records or significantly alters an established system of records, a report to the Administrator of the Office of Information and Regulatory Affairs, OMB. Each agency is also required to send copies of the report to the Chair of the Senate Committee on Homeland Security and Governmental Affairs and the Chair of the House of Representatives Committee on Oversight and Government Reform.

A system of records is considered ''altered'' whenever an agency expands the types or categories of information maintained, significantly expands the types or categories of individuals about whom records are maintained, changes the purpose for which the information is used, changes the equipment configuration in a way that creates substantially greater access to the records, or adds a routine use disclosure to the system.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal**

Register, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: July 28, 2011.

James W. Runcie,

Acting Chief Operating Officer, Federal Student Aid.

For the reasons discussed in the preamble, the Acting Chief Operating Officer, Federal Student Aid, of the U.S. Department of Education (Department), publishes a notice of an altered system of records to read as follows:

SYSTEM NUMBER:
18–11–01

SYSTEM NAME:

Federal Student Aid Application File.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATIONS:

Virtual Data Center (VDC), 2300 W. Plano Parkway, Plano, TX 75075 (Electronic records).

Vangent, 901 South 42nd Street, Mt Vernon, IL 62864 (Paper, Free Application for Federal Student Aid (FAFSA) Applications Storage Facility).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The Federal Student Aid Application File (the system), which is part of the Department's Central Processing System (CPS), contains records on students who apply for Federal student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (HEA). This system also contains information on the parent(s) of a dependent applicant and the spouse of a married applicant. In addition, this system covers secondary school students about whom requesting entities, such as schools, local educational agencies (LEAs), and other local and State agencies, submit information (*e.g.,* name, date of birth, and zip code) to the Department in order for the Department to provide these entities with the student's Free Application for Federal Student Aid (FAFSA) completion filing status to promote and encourage the student to apply for Title IV, HEA program assistance, State assistance, and aid awarded by institutions of higher education.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system of records contains information provided by applicants for Title IV, HEA program assistance, on the FAFSA, including, but not limited to, the applicant's name, address, Social Security number (SSN), date of birth, telephone number, driver's license number, e-mail address, citizenship status, marital status, legal residence, status as a veteran, educational status, and financial data. This system also contains information provided about the parent(s) of a dependent applicant, including, but not limited to, the parent's highest level of schooling completed, marital status, SSN, last name and first initial, date of birth, e-mail address, number in household supported by the parent, and income and asset information. For an applicant who is married, this system of records also contains spousal income and asset information.

While using this system to analyze its student population data for verification selection via the Institutional Student Information Record (ISIR) Analysis Tools (IA Tools) product, postsecondary institution(s) attended by the applicant may create user defined fields with institutional data that are saved to the system. These data elements may consist of information that is privacy protected. Examples include, but are not limited to: The student's grade point average or information about a student's employment with the postsecondary institution.

The system determines an applicant's expected family contribution (EFC). The EFC is used by institutions to determine the student's eligibility for Federal and institutional program assistance, and by States to determine the student's eligibility for State grants. The Department notifies the applicant of the results of his or her application via the Student Aid Report (SAR). The Department provides the institutions identified on the applicant's FAFSA with the ISIR, which indicates whether there are discrepant or insufficient data, school adjustments, or CPS assumptions that affect processing of the FAFSA. Other information that the system includes, but is not limited to: Secondary EFC, dependency status, Federal Pell Grant Eligibility, duplicate SSN, selection for verification, Simplified Needs Test (SNT) or Automatic Zero EFC (used for extremely low family income), CPS processing comments, reject codes (explanation for applicant's FAFSA not computing EFC), assumptions made with regard to the student's data due to incomplete or inconsistent FAFSA data, financial aid administrator's (FAA) adjustments including dependency status overrides, and CPS record processing information (application receipt date, transaction number, transaction process date, SAR Serial Number, Compute Number, Data Release Number (DRN), National Student Loan Database System (NSLDS) match results, a bar code, and transaction source).

Information from other Department systems, such as NSLDS, the Common Origination and Disbursement System (COD), and the Student Aid Internet Gateway (SAIG) Participation Management System, is added to this system of records. The Appendix contains a more detailed description of the data added to this system of records as a result of the exchanges of data with other Department systems and the Department's computer matching programs with other Federal agencies.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title IV of the Higher Education Act (HEA), as amended (20 U.S.C. 1001 *et seq.*).

PURPOSES:

The information contained in this system is maintained for the purposes of: (1) Assisting with the determination, correction, processing, tracking, and reporting of program eligibility and benefits for the Federal student financial assistance programs authorized by Title IV of the HEA; (2) making a loan, grant, or scholarship; (3) verifying the identity of the applicant, the spouse if applicable, and the parent(s) of a dependent applicant, and the accuracy of the information in this system; (4) reporting the results of the need analysis, Federal Pell Grant eligibility determination, and the results of duly authorized computer matching programs between the Department and other Federal agencies to applicants, postsecondary institutions, third-party servicers, State agencies designated by the applicant, and other Departmental and investigative components for use in operating and evaluating the Title IV, HEA programs and in the imposition of criminal, civil, or administrative sanctions; (5) enforcing the terms and conditions of a Title IV, HEA loan or grant; (6) servicing and collecting a delinquent Title IV, HEA loan or grant; (7) initiating enforcement action against an individual involved in program fraud, abuse, or noncompliance; (8) locating a debtor; (9) maintaining a record of the data supplied by those requesting assistance; (10) ensuring compliance with and enforcing Title IV, HEA programmatic requirements; (11) acting as a repository and source for

information necessary to fulfill the requirements of Title IV of the HEA; (12) evaluating Title IV, HEA program effectiveness; (13) enabling institutions of higher education designated by the applicant to review and analyze the financial aid data of their applicant population; (14) assisting students with the completion of the application for the Federal student financial assistance programs authorized by Title IV of the HEA; (15) determining the eligibility of applicants for the award of State postsecondary education assistance and for the award of aid by eligible institutions of higher education or other entities designated by the Secretary and administering those awards; and 16) promoting and encouraging application for Title IV, HEA program assistance, State assistance, and aid awarded by institutions of higher education or other entities designated by the Secretary.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USES AND PURPOSES OF SUCH USES:

The Department may disclose information contained in a record in this system of records under the routine uses listed in this system of records without the consent of the individual if the disclosure is compatible with the purposes for which the record was collected. These disclosures may be made on a case-by-case basis, or, if the Department has complied with the computer matching requirements of the Privacy Act of 1974, as amended (Privacy Act), under a computer matching agreement.

(1) *Program Disclosures.*

(a) To verify the identity of the applicant and the applicant's spouse, if applicable, and the parent(s) of a dependent applicant; to determine the accuracy of the information contained in the record; to support compliance with Title IV, HEA statutory and regulatory requirements; and to assist with the determination, correction, processing, tracking, and reporting of program eligibility and benefits, the Department may disclose records to guaranty agencies and financial institutions participating in the Federal Family Education Loan (FFEL) Programs, institutions of higher education, third-party servicers, and Federal and State agencies;

(b) To provide an applicant's financial aid history, including information about the applicant's Title IV, HEA loan defaults and Title IV, HEA grant program overpayments, the Department may disclose records to institutions of higher education, guaranty and State agencies, financial institutions participating in the FFEL Programs, and third-party servicers;

(c) To facilitate receiving and correcting application data, processing Federal Pell Grants and Direct Loans, and reporting Federal Perkins Loan Program expenditures to the Department's processing and reporting systems, the Department may disclose records to institutions of higher education, State agencies, and third-party servicers;

(d) To assist loan holders with the collection and servicing of Title IV, HEA loans, to support pre-claims/supplemental pre-claims assistance, to assist in locating borrowers, and to assist in locating students who owe grant overpayments, the Department may disclose records to guaranty agencies and financial institutions participating in the FFEL Programs, institutions of higher education, third-party servicers, and Federal, State, and local agencies;

(e) To facilitate assessments of Title IV, HEA program compliance, the Department may disclose records to guaranty agencies and financial institutions participating in the FFEL Programs, institutions of higher education, third-party servicers, and Federal, State, and local agencies;

(f) To assist in locating holders of loan(s), the Department may disclose records to student borrowers, guaranty agencies and financial institutions participating in the FFEL Programs, institutions of higher education, third-party servicers, and Federal, State, and local agencies;

(g) To assist in assessing the administration of Title IV, HEA program funds by guaranty agencies, financial institutions, institutions of higher education, and third-party servicers, the Department may disclose records to Federal and State agencies;

(h) To enforce the terms of a loan or grant or to assist in the collection of loan or grant overpayments, the Department may disclose records to guaranty agencies and financial institutions participating in the FFEL programs, institutions of higher education, third-party servicers, and Federal, State, and local agencies;

(i) To assist borrowers in repayment, the Department may disclose records to guaranty agencies and financial institutions participating in the FFEL program, institutions of higher education, third-party servicers, and Federal, State, and local agencies;

(j) To initiate legal action against an individual involved in illegal or unauthorized Title IV, HEA program expenditures or activities, the Department may disclose records to guaranty agencies and financial institutions participating in the FFEL programs, institutions of higher education, third-party servicers, and Federal, State, and local agencies;

(k) To initiate or support a limitation, suspension, or termination action, an emergency action, or a debarment or suspension action, the Department may disclose records to guaranty agencies and financial institutions participating in the FFEL programs, institutions of higher education, third-party servicers, and Federal, State, and local agencies;

(l) To investigate complaints, update files, and correct errors, the Department may disclose records to guaranty agencies and financial institutions participating in the FFEL programs, institutions of higher education, third-party servicers, and Federal, State, and local agencies;

(m) To inform the parent(s) of a dependent applicant or a spouse of an applicant of information about the parent(s) or spouse in an application for Title IV, HEA funds, the Department may disclose records to the parent(s) or the spouse, respectively;

(n) To disclose to the parent(s) of a dependent applicant applying for a PLUS loan (to be used on behalf of a student), to identify the student as the correct beneficiary of the PLUS loan funds, and to allow the processing of the PLUS loan application and promissory note, the Department may disclose records to the parent(s) applying for the PLUS loan;

(o) To expedite the student application process, the Department may disclose information from this system, upon request by a third-party, provided that the third-party provides the Department with the applicant's first and last name, SSN, date of birth, and DRN. A DRN is a four-digit number assigned to an application by Federal Student Aid;

(p) To encourage a student to complete a FAFSA or to assist a student with the completion of a FAFSA, the Department may disclose the FAFSA filing status of the student to a LEA, a secondary school where the student is or was enrolled, or other State, local, or private entity designated by the Secretary;

(q) To enable an applicant, should the applicant wish to do so, to obtain information from other Federal agencies' records that will assist the applicant in completing the FAFSA online, the Department may disclose information from this system of records to other Federal agencies, such as the Internal Revenue Service; and

(r) To determine an applicant's eligibility for the award of State

postsecondary education assistance and for the award of aid by eligible institutions of higher education or other entities designated by the Secretary and to administer those awards, the Department may disclose information from this system of records to State agencies, eligible institutions of higher education, and other entities designated by the Secretary.

(2) *Disclosure for Use by Other Law Enforcement Agencies.* The Department may disclose information to any Federal, State, local, or foreign agency or other public authority responsible for enforcing, investigating, or prosecuting violations of administrative, civil, or criminal law or regulation if that information is relevant to any enforcement, regulatory, investigative, or prosecutorial responsibility within the receiving entity's jurisdiction.

(3) *Enforcement Disclosure.* If information in the system of records, either alone or in connection with other information, indicates a violation or potential violation of any applicable statutory, regulatory, or legally binding requirement, the Department may disclose records to an entity charged with investigating or prosecuting those violations or potential violations.

(4) *Litigation and Alternative Dispute Resolution (ADR) Disclosures.*

(a) *Introduction.* In the event that one of the following parties is involved in litigation or ADR, or has an interest in litigation or ADR, the Department may disclose certain records to the parties described in paragraphs (b), (c), and (d) of this routine use under the conditions specified in those paragraphs:

(i) The Department or any of its components.

(ii) Any Department employee in his or her official capacity.

(iii) Any Department employee in his or her individual capacity where the Department of Justice (DOJ) agrees to or has been requested to provide or arrange for representation of the employee.

(iv) Any Department employee in his or her individual capacity where the Department has agreed to represent the employee.

(v) The United States, where the Department determines that the litigation is likely to affect the Department or any of its components.

(b) *Disclosure to the DOJ.* If the Department determines that disclosure of certain records to the DOJ is relevant and necessary to litigation or ADR, the Department may disclose those records as a routine use to the DOJ.

(c) *Adjudicative Disclosures.* If the Department determines that disclosure of certain records to an adjudicative body before which the Department is authorized to appear or to an individual or entity designated by the Department or otherwise empowered to resolve or mediate disputes is relevant and necessary to litigation or ADR, the Department may disclose those records as a routine use to the adjudicative body, individual, or entity.

(d) *Parties, Counsel, Representatives, and Witnesses.* If the Department determines that disclosure of certain records is relevant and necessary to litigation or ADR, the Department may disclose those records as a routine use to the party, counsel, representative, or witness.

(5) *Freedom of Information Act (FOIA) and Privacy Act Advice Disclosure.* The Department may disclose records to the DOJ or to the Office of Management and Budget (OMB) if the Department determines that disclosure would help in determining whether records are required to be disclosed under the FOIA or the Privacy Act.

(6) *Contracting Disclosure.* If the Department contracts with an entity to perform any function that requires disclosing records to the contractor's employees, the Department may disclose the records to those employees. Before entering into such a contract, the Department shall require the contractor to establish and maintain the safeguards required under 5 U.S.C. 552a(m) of the Privacy Act with respect to the records.

(7) *Congressional Member Disclosure.* The Department may disclose records to a member of Congress in response to an inquiry from the member made at the written request of the individual whose records are being disclosed. The member's right to the information is no greater than the right of the individual who requested it.

(8) *Employment, Benefit, and Contracting Disclosure.*

(a) *For Decisions by the Department.* The Department may disclose a record to a Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement or other pertinent records, or to another public authority or professional organization, if necessary to obtain information relevant to a Department decision concerning the hiring or retention of an employee or other personnel action, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

(b) *For Decisions by Other Public Agencies and Professional Organizations.* The Department may disclose a record to a Federal, State, local, or other public authority or professional organization, in connection with the hiring or retention of an employee or other personnel action, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit, to the extent that the record is relevant and necessary to the receiving entity's decision on the matter.

(9) *Employee Grievance, Complaint, or Conduct Disclosure.* If a record is relevant and necessary to an employee grievance, complaint, or disciplinary action, the Department may disclose the record in the course of investigation, fact-finding, or adjudication to any witness, designated fact-finder, mediator, or other person designated to resolve issues or decide the matter.

(10) *Labor Organization Disclosure.* The Department may disclose records from this system of records to an arbitrator to resolve disputes under a negotiated grievance procedure or to officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation.

(11) *Disclosure to the DOJ.* The Department may disclose records to the DOJ to the extent necessary for obtaining DOJ advice on any matter relevant to an audit, inspection, or other inquiry related to the programs covered by this system.

(12) *Research Disclosure.* The Department may disclose records to a researcher if the Department determines that the individual or organization to which the disclosure would be made is qualified to carry out specific research related to functions or purposes of this system of records. Further, the Department may disclose records from this system of records to that researcher solely for the purpose of carrying out that research related to the functions or purposes of this system of records. The researcher shall be required to maintain Privacy Act safeguards with respect to the disclosed records.

(13) *Disclosure to the OMB for Federal Credit Reform Act (CRA) Support.* The Department may disclose records to OMB as necessary to fulfill CRA requirements. These requirements currently include transfer of data on lender interest benefits and special allowance payments, defaulted loan balances, and supplemental pre-claims assistance payments information.

(14) *Disclosures to third-parties through computer matching programs.* Any information from this system of records, including personal information obtained from other agencies through computer matching programs, may be disclosed to any third-party through a computer matching program in connection with an individual's

application or participation in any grant or loan program administered by the Department. Purposes of these disclosures may be to determine program eligibility and benefits, enforce the conditions and terms of a loan or grant, permit the servicing and collecting of a loan or grant, counsel the individual in repayment efforts, investigate possible fraud and verify compliance with program regulations, locate a delinquent or defaulted debtor, or initiate legal action against an individual involved in program fraud or abuse.

(15) *Disclosure in the Course of Responding to Breach of Data.* The Department may disclose records from this system to appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosures pursuant to 5 U.S.C. 552a(b)(12): The Department may disclose the following information to a consumer reporting agency regarding a valid overdue claim of the Department: (1) The name, address, taxpayer identification number, and other information necessary to establish the identity of the individual responsible for the claim; (2) the amount, status, and history of the claim; and (3) the program under which the claim arose. The Department may disclose the information specified in this paragraph under 5 U.S.C. 552a(b)(12) and the procedures contained in subsection 31 U.S.C. 3711(e). A consumer reporting agency to which these disclosures may be made is defined at 31 U.S.C. 3701(a)(3).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper applications are maintained in standard Federal Records Center boxes in locked storage rooms at the contractor facility in Mt. Vernon, Illinois, and then moved to the Federal archives where the records are maintained.

Computerized applicant records, which include optically imaged documents, are maintained on magnetic tape reels, cartridges, and hard disks in the computer facility and locked storage rooms within the Virtual Data Center. Microfiche records maintained in the Washington, DC office are stored in a locked fireproof file cabinet. Access is available only to authorized personnel.

RETRIEVABILITY:

Records are indexed and retrieved by the applicant's SSN, name, and the academic year in which the applicant applied for Title IV, HEA program assistance.

SAFEGUARDS:

Physical access to the data systems housed within the VDC is controlled by a computerized badge reading system, and the entire complex is patrolled by security personnel during non-business hours. The computer system employed by the Department offers a high degree of resistance to tampering and circumvention. Multiple levels of security are maintained within the computer system control program. This security system limits data access to Department and contract staff on a ''need-to-know'' basis, and controls individual users' ability to access and alter records within the system. All users of this system of records are given a unique user ID with personal identifiers. All interactions by individual users with the system are recorded. Paper applications are maintained in standard Federal Records Center boxes in a locked storage room at the contractor facility in Mount Vernon, Illinois, and then moved to the Federal archives where the records are maintained.

RETENTION AND DISPOSAL:

The Department will retain all identifiable CPS records for a period not to exceed 15 years after the end of the award year in accordance with the applicable Record Retention Schedule as approved by the National Archives and Records Administration. At the conclusion of the mandatory retention period, these records will be destroyed consistent with legal retention requirements established by the Department in conjunction with the National Archives and Records Administration.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Application Processing Division, Program Management Systems, Federal Student Aid, U.S. Department of Education, 830 First St., NE., UCP, room 63C4, Washington, DC 20202.

NOTIFICATION PROCEDURES:

If you wish to determine whether a record exists regarding you in the system of records, contact the system manager and provide your name, date of birth, and SSN or call 1–800–4–FED–AID (1–800–433–3243) and give the same information. Requests for notification about whether the system of records contains information about an individual must meet the requirements of the regulations at 34 CFR 5b.5, including proof of identity.

RECORD ACCESS PROCEDURES:

If you wish to gain access to a record in this system, contact the system manager and provide information as described in the Notification Procedure. Requests by an individual for access to a record must meet the requirements of the regulations at 34 CFR 5b.5, including proof of identity.

CONTESTING RECORD PROCEDURES:

If you wish to contest the content of a record for the current processing year (which begins on January 1 of the calendar year and continues for 18 months until June 30 of the following calendar year) in the FAFSA, contact the system manager with the information described in the Notification Procedure, identify the specific items to be changed, and provide a justification for the change. Requests to amend a record must meet the requirements of regulations at 34 CFR 5b.7.

RECORD SOURCE CATEGORIES:

Applicants for Federal student financial aid, their spouses (if married), and the parent(s) of dependent applicants provide the information used in this system by filing a phone, paper, or electronic version of the FAFSA with the Department of Education. (The electronic FAFSA can be accessed at *http://www.fafsa.ed.gov.*)

Postsecondary institutions designated by the applicant or third-party servicers designated by the postsecondary institution may correct the records in this system as a result of documentation provided by the applicant or by a dependent applicant's parents, such as Federal income return(s) (IRS Form

1040, IRS Form 1040A, or IRS Form 1040EZ), Social Security card(s), and Department of Homeland Security I–551 Resident Alien cards.

This system contains information added during CPS processing and information received from other Department systems, including NSLDS, COD, and the SAIG Participation Management System. For more information about the information received from these other Department systems, see the Appendix.

The results of computer matching programs with the following Federal agencies are also added to the student's record during CPS processing: The Social Security Administration (SSA), the Department of Veterans Affairs (VA), the Selective Service System (SSS), the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the Department of Defense (DoD). For more information about the information received from these computer matching programs, see the Appendix.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Appendix to 18–11–01

ADDITIONAL INFORMATION ABOUT CATEGORIES OF RECORDS IN THE SYSTEM AND RECORD SOURCE CATEGORIES:

Data provided to the Department as a result of computer matching with other Federal agencies are added during CPS processing. These computer matches are with the SSA to verify the SSNs of applicants, and dependent applicants' parent(s), and to confirm the U.S. citizenship status of applicants as recorded in SSA records and date of death (if applicable) of applicants, and dependent applicants' parents, pursuant to sections 428B(f)(2), 483(a)(12), and 484(g) and (p) of the HEA (20 U.S.C. 1078–2(f)(2), 1090(a)(12), and 1091(g) and (p)); with the VA to verify the status of applicants who claim to be veterans, pursuant to section 480(c) and (d)(1)(D) of the HEA (20 U.S.C. 1087vv(c) and (d)(1)(D)); with the SSS to confirm the registration status of male applicants, pursuant to section 484(n) of the HEA (20 U.S.C. 1091(n)); with the DHS to confirm the immigration status of applicants for assistance as authorized by section 484(g) of the HEA (20 U.S.C. 1091(g)); with the DOJ to enforce any requirement imposed at the discretion of a court, pursuant to section 5301 of the Anti-Drug Abuse Act of 1988, Public Law 100–690, as amended by section 1002(d) of the Crime Control Act of 1990, Public Law 101–647 (21 U.S.C. 862), denying Federal benefits under the programs established by Title IV of the HEA to any individual convicted of a State or Federal offense for the distribution or possession of a controlled substance; and with the DoD to identify dependents of U.S. military personnel who died in service in Iraq and Afghanistan after September 11, 2001, to determine if they are eligible for increased amounts of Title IV, HEA program assistance, pursuant to sections 420R and 473(b) of the HEA (20 U.S.C. 1070h and 1087mm(b)).

During CPS processing, the Department's COD system sends information to this system for students who have received a Federal Pell Grant. The CPS uses this information for verification analysis and for end-of-year reporting. These data include, but are not limited to: Verification Selection and Status, Potential Over-award Project (POP) indicator, Institutional Cost of Attendance, Reporting and Attended Campus Pell ID and Enrollment Date, and Federal Pell Grant Program information (Scheduled Federal Pell Grant Award, Origination Award Amount, Total Accepted Disbursement Amount, Number of Disbursements Accepted, Percentage of Eligibility Used At This Attended Campus Institution, and Date of Last Activity from the Origination or Disbursement table).

The CPS also receives applicant data from the Department's NSLDS system each time an application is processed or corrected. This process assesses student aid eligibility, updates financial aid history, and ensures compliance with Title IV, HEA regulations. Some of these data appear on the applicant's SAR and ISIR. Title IV, HEA award information is provided to NSLDS from several different sources. Federal Perkins Loan data and Federal Supplemental Educational Opportunity Grant (FSEOG) overpayment data are sent from postsecondary institutions or their third-party servicers; the Department's COD system provides Federal Pell Grant and Direct Loan data; and State and guaranty agencies provide data on FFEL loans received from lending institutions participating in the FFEL programs.

Financial aid transcript data reported by NSLDS provides applicants, postsecondary institutions, and third-party servicers with information about the type(s), amount(s), dates, and overpayment status of prior and current Title IV HEA funds the applicant received. FFEL and William D. Ford Federal Direct Student Loan (DL) data reported by NSLDS include, but are not limited to: (1) Aggregate Loan Data, such as Subsidized, Unsubsidized; Combined Outstanding Principal Balances; Unallocated Consolidated Outstanding Principal Balances, Subsidized, Unsubsidized; Combined Pending Disbursements, Subsidized, Unsubsidized; Combined Totals; and Unallocated Consolidated Totals; (2) Detail Loan Data, such as Loan Sequence Number; Loan Type Code; Loan Change Flag; Loan Program Code; Current Status Code and Date; Outstanding Principal Balance and Date; Net Loan Amount; Loan begin and End Dates; Amount and Date of Last Disbursement; Guaranty Agency Code; School Code; Contact Code; and Institution Type and Grade Level; and (3) system flags for Additional Unsubsidized Loan; Capitalized Interest; Defaulted Loan Change; Discharged Loan Change; Loan Satisfactory Repayment Change; Active Bankruptcy Change; Overpayments Change; Aggregate Loan Change; Defaulted Loan; Discharged Loan; Loan Satisfactory Repayment; Active Bankruptcy; Additional Loans; DL Master Promissory Note; DL PLUS Loan Master Promissory Note; Subsidized Loan Limit; and the Combined Loan Limit. Federal Perkins Loan data reported by NSLDS include, but are not limited to: Cumulative and Current Year Disbursement Amounts; flags for Perkins Loan Change; Defaulted Loan; Discharged Loan; Loan Satisfactory Repayment; Active Bankruptcy; Additional Loans; and Perkins Overpayment Flag and Contact (School or Region). Federal Pell Grant payment data reported include, but are not limited to: Pell Sequence Number; Pell Attended School Code; Pell Transaction Number; Last Update Date; Scheduled Amount; Award Amount; Amount Paid to Date; Percent Scheduled Award Used; Pell Payment EFC; Flags for Pell Verification; and Pell Payment Change. Federal Teacher Education Assistance for College and Higher Education (TEACH) Grant Program data include, but are not limited to: TEACH Grant Overpayment Contact; TEACH Grant Overpayment Flag; TEACH Grant Loan Principal Balance; TEACH Grant Total; and Teach Grant Change Flag. The National Science and Mathematics Access to Retain Talent Grant (SMART Grant) data include, but are not limited to: SMART Grant Overpayment Flag; SMART Grant Overpayment Contact; and SMART Grant Change Flag. Iraq and Afghanistan Service Grants data include, but are not limited to: Total Award Amount. Academic Competitiveness Grant (ACG) data include, but are not limited to: ACG Award Amount; ACG Overpayment Flag; and ACG Payment Change Flag. FSEOG data include, but are not limited

to: Overpayment Flag and contact information.

The Department obtains and exchanges information that is included in this system of records from institutions offering secondary level education, local educational agencies, other local agencies, postsecondary institutions, third-party servicers, State agencies, and lending institutions that participate in the FFEL programs. These eligible entities register with the SAIG system to participate in the information exchanges specified for their business processes.

[FR Doc. 2011–19607 Filed 8–2–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Energy Efficiency and Renewable Energy

Biomass Research and Development Technical Advisory Committee

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

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the Biomass Research and Development Technical Advisory Committee under Section 9008(d) of the Food, Conservation, and Energy Act of 2008. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that agencies publish these notices in the **Federal Register** to allow for public participation. This notice announces the meeting of the Biomass Research and Development Technical Advisory Committee.

DATES AND TIMES: August 23, 2011: 7:30 a.m.–2 p.m.; August 24, 2011: 7:30 a.m.–12:30 p.m.

ADDRESSES: I Hotel, 1900 S. First Street, Champaign, Illinois 61820.

FOR FURTHER INFORMATION CONTACT: Elliott Levine, Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; (202) 586–1476; *E-mail: elliott.levine@ee.doe.gov* or Roy Tiley at (410) 997–7778 ext. 220; *E-mail: rtiley@bcs-hq.com.*

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To provide advice and guidance that promotes research and development leading to the production of biobased fuels and biobased products.

Tentative Agenda: Agenda will include the following:

- Update on USDA Biomass R&D Activities;
- Update on DOE Biomass R&D Activities;
- Presentation on Genetically Modified Organism (GMO) regulations;
- Presentation on Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation (GREET) model development;
- Presentation on ethanol blends.

Public Participation: In keeping with procedures, members of the public are welcome to observe the business of the Biomass Research and Development Technical Advisory Committee. To attend the meeting and/or to make oral statements regarding any of the items on the agenda, you must contact Elliott Levine at (202) 586–1476; *E-mail: elliott.levine@ee.doe.gov* or Roy Tiley at (410) 997–7778 ext. 220; *E-mail: rtiley@bcs-hq.com at least 7 business days* prior to the meeting. Members of the public will be heard in the order in which they sign up at the beginning of the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chair of the Committee will make every effort to hear the views of all interested parties. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. The Chair will conduct the meeting to facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying at *http://biomassboard.gov/committee/meetings.html.*

Issued at Washington, DC, on July 28, 2011.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2011–19649 Filed 8–2–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. IC11–1–000 and IC11–1F–000]

Commission Information Collection Activities (FERC Form 1 and FERC Form 1F); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed information collections and request for comments.

SUMMARY: In compliance with the requirements of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A) (2006), (Pub. L. 104–13), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the proposed information collections described below.

DATES: Comments in consideration of the collections of information are due October 3, 2011.

ADDRESSES: Comments may be filed either electronically or in paper format, and should refer to Docket Nos. IC11–1–000 and IC11–1F–000. For comments that only pertain to the FERC Form 1, specify only the related docket number. Comments that only pertain to the FERC Form 1F cannot be eFiled at this time due to a system issue and must be submitted via mail/courier. Documents must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission submission guidelines at *http://www.ferc.gov/help/submission-guide.asp.*

Comments may be filed electronically under Docket Number IC11–1–000 when comment pertains to both collections via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* First time users will have to establish a user name and password (*http://www.ferc.gov/docs-filing/eregistration.asp*) before eFiling. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments through eFiling. Commenters filing electronically should not make a paper filing. Commenters that are not able to file electronically must send their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

Users interested in receiving automatic notification of activity in Docket Number IC11–1 may do so through eSubscription at *http://www.ferc.gov/docs-filing/esubscription.asp.* However, due to a system issue, Docket Number IC11–1F is not available at this time for eSubscription. In addition, all comments and FERC issuances may be viewed, printed or downloaded remotely through FERC's website using the ''eLibrary'' link and searching on Docket Numbers IC11–1 and IC11–1F. For user assistance, contact FERC Online Support at: *ferconlinesupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by e-mail at *DataClearance@FERC.gov,* telephone at (202) 502–8663, and fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION: In accordance with sections 304 and 309 of

the Federal Power Act, FERC is authorized to collect and record data to the extent it considers necessary, and to prescribe rules and regulations concerning accounts, records and memoranda. The Commission may prescribe a system of accounts for jurisdictional companies and after notice and an opportunity for hearing may determine the accounts in which particular outlays and receipts will be entered, charged or credited.

The Form No. 1 is a comprehensive financial and operating report submitted for electric rate regulation and financial audits. Major is defined as having (1) One million Megawatt hours or more; (2) 100 megawatt hours of annual sales for resale; (3) 500 megawatt hours of annual power exchange delivered; or (4) 500 megawatt hours of annual wheeling for others (deliveries plus losses).

FERC Form 1–F is designed to collect financial and operational information from non-major public utilities and licensees. Non-major is defined as having total annual sales of 10,000 megawatt-hours or more in the previous calendar year and not classified as Major. The Commission collects Form Nos. 1 and 1–F information as prescribed in 18 CFR 141.1 and 141.2.

Under the existing regulations FERC jurisdictional entities subject to its Uniform System of Accounts [1] must annually (quarterly for the 3Q) file with the Commission a complete set of financial statements, along with other selected financial and non financial data through the submission of FERC Forms 1, 1–F, and 3Q [2]. The FERC Annual/Quarterly Report Forms provide the Commission, as well as others, with an informative picture of the jurisdictional entities financial condition along with other relevant data that is used by the Commission, as well as others, in making economic judgments about the entity or its industry.

The information collected in the forms is used by Commission staff, state regulatory agencies and others in the review of the financial condition of regulated companies. The information is also used in various rate proceedings, industry analyses and in the Commission's audit programs and as appropriate, for the computation of annual charges based on certain schedules contained on the forms. The Commission provides the information to the public, interveners and all interested parties to assist in the proceedings before the Commission.

Additionally, the uniformity of information helps to present accurately the entity's financial condition and produces comprehensive data related to the entity's financial history helping to act as a guide for future action. The uniformity provided by the Commission's chart of accounts and related accounting instructions permits comparability and financial statement analysis of data provided by jurisdictional entities. Comparability of data and financial statement analysis for a particular entity from one period to the next, or between entities, within the same industry, would be difficult to achieve if each company maintained its own accounting records using dissimilar accounting methods and classifications to record similar transactions and events.

The FERC Annual Report Forms provide the Commission, as well as others, with an informative picture of the jurisdictional entities' financial condition along with other relevant data that is used by the Commission in making economic judgments about the entity or its industry. For financial information to be useful to the Commission, it must be understandable, relevant, reliable and timely.

Action: The Commission is requesting a three-year extension of the FERC Forms 1 and 1F reporting requirements, with no changes to the forms.

Burden Statement: The estimated annual public reporting burden is reflected in the following table:

Data collection	Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1) × (2) × (3)
Form 1	209	1	1,162	242,858
Form 1F	5	1	116	580
Total				243,438

The total estimated annual cost burden to respondents on the FERC Form 1 is $12,385,758 (242,858 hours × $51/hour [3]). The average cost per respondent is $59,262.

The total estimated annual cost burden to respondents on the FERC Form 1F is $29,580 (580 hours × $51/hour [3]). The average cost per respondent is $5,916.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collections of information; and (7) transmitting or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) 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; (2) the accuracy of the agency's estimate of the burden of the proposed

[1] *See* 18 CFR part 201.

[2] The FERC Form 3Q data collection (OMB Control No. 205) is not being renewed as part of this proceeding. Some information regarding the Form 3Q is included here as it relates to the FERC Forms 1 and 1F.

[3] The per hour figures were obtained from the Bureau of Labor Statistics National Industry-Specific Occupational and Employment Wage Estimates (*http://www.bls.gov/oes/current/naics4_221100.htm*), and are based on the mean wage statistics for staff in the areas of management, business and financial, legal and administrative. The mean wage was then increased by 20% to account for benefits/overhead.

collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.* permitting electronic submission of responses).

Dated: July 28, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19635 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC11–549–000]

Commission Information Collection Activities (FERC–549); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed information collection and request for comments.

SUMMARY: In compliance with the requirements of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, 44 USC 3506(c)(2)(A) (2006), (Pub. L. 104–13), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the proposed information collection described below.

DATES: Comments in consideration of the collection of information are due October 3, 2011.

ADDRESSES: Comments may be filed either electronically (eFiled) or in paper format, and should refer to Docket No. IC11–549–000. Documents must be prepared in an acceptable filing format and in compliance with Commission submission guidelines at *http://www.ferc.gov/help/submission-guide.asp.* eFiling instructions are available at: *http://www.ferc.gov/docs-filing/efiling.asp.* First time users must follow eRegister instructions at: *http://www.ferc.gov/docs-filing/eregistration.asp,* to establish a user name and password before eFiling. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of eFiled comments. Commenters making an eFiling should not make a paper filing. Commenters that are not able to file electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

Users interested in receiving automatic notification of activity in this docket may do so through eSubscription at *http://www.ferc.gov/docs-filing/esubscription.asp.* All comments and FERC issuances may be viewed, printed or downloaded remotely through FERC's eLibrary at *http://www.ferc.gov/docs-filing/elibrary.asp,* by searching on Docket No. IC11–549. For user assistance, contact FERC Online Support by e-mail at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

FOR FURTHER INFORMATION: Ellen Brown may be reached by e-mail at *Data Clearance@FERC.gov,* telephone at (202) 502–8663, and fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC–549, ''Gas Pipeline Rates: NGPA Title III and NGA Blanket Certificate Transactions'' (OMB Control No. 1902–0086), is used by the Commission to implement the statutory provisions of sections 311 and 312 of the Natural Gas Policy Act (NGPA) and section 7 of the Natural Gas Act (NGA). The Commission implements these statutes in 18 CFR part 284.

Semi-Annual Storage Report for Interstate Pipelines

18 CFR 284.13(e) requires each interstate pipeline to file with the Commission a report of storage activity. The Commission adopted the existing semi-annual storage reporting requirements for interstate pipelines in their current form in 1992 as part of Order No. 636, and there have been only minor modifications in the semi-annual storage reporting requirements since that date.

Natural gas production is relatively constant throughout the year, while many uses of natural gas, residential space heating for example, are seasonal. Natural gas storage plays a critical role in balancing the seasonal demand with relatively constant supply, and the data collected in the semi-annual storage report provides important information about natural gas pipelines' ability to affect the prices shippers can obtain from consumers.

Improved storage technology and the increased use of natural gas in industry and electric generation have helped transform the storage market since 1992. There has been a sharp increase in demand for natural gas outside of the traditional winter months. Withdrawals and injections, instead of occurring on a uniform annual schedule based on heating needs, now occur dynamically year-round in response to market forces.

Transportation by Interstate Pipelines

In 18 CFR 284.102(e) the Commission requires interstate pipelines to obtain proper certification in order to ship natural gas on behalf of intrastate pipelines and local distribution companies (LDC). This certification consists of a letter from the intrastate pipeline or LDC authorizing the intrastate pipeline to ship gas on its behalf. In addition, interstate pipelines must obtain from its shippers certifications including sufficient information to verify that their services qualify under this section.

Rates and Charges for Intrastate Pipelines

18 CFR 284.123(b) provides that intrastate gas pipeline companies file for Commission approval of rates for services performed in the interstate transportation of gas. An intrastate gas pipeline company may elect to use rates contained in one of its then effective transportation rate schedules on file with an appropriate state regulatory agency for intrastate service comparable to the interstate service OR file proposed rates and supporting information showing the rates are cost based and are fair and equitable. 150 days after the application is filed the rate is deemed to be fair and equitable unless the Commission either extends the time for action, institutes a proceeding or issues an order providing for rates it deems to be fair and equitable.

18 CFR 284.123(e) requires that within 30 days of commencement of new service any intrastate pipeline engaging in the transportation of gas in interstate commerce must file a statement that includes the interstate rates and a description of how the pipeline will engage in the transportation services, including operating conditions. If an intrastate gas pipeline company changes its operations or rates it must amend the statement on file with the Commission. Such amendment is to be filed not later than 30 days after commencement of the change operations or change in rate election.

Code of Conduct [1]

The Commission's regulations at 18 CFR 284.288 and 284.403 provide that

[1] These requirements were approved by OMB originally in FERC–916 (OMB Control No. 224,

Continued

applicable sellers of natural gas adhere to a code of conduct when making gas sales in order to protect the integrity of the market. The Commission imposes this record retention requirement on applicable sellers to ''retain, for a period of five years, all data and information upon which it billed the prices it charged for natural gas it sold pursuant to its market based sales certificate or the prices it reported for use in price indices.'' FERC uses these records to monitor the jurisdictional transportation activities and unbundled sales activities of interstate natural gas pipelines and blanket marketing certificate holders.

The record retention period of five years is necessary due to the importance of records related to any investigation of possible wrongdoing and related to assuring compliance with the codes of conduct and the integrity of the market. The requirement is necessary to ensure consistency with the rule prohibiting market manipulation (regulations adopted in Order No. 670, implementing the EPAct 2005 anti-manipulation provisions [2]) and the generally applicable five-year statute of limitations where the Commission seeks civil penalties for violations of the anti-manipulation rules or other rules, regulations, or orders to which the price data may be relevant.

Failure to have this information available would mean the Commission is unable to perform its regulatory functions and to monitor and evaluate transactions and operations of interstate pipelines and blanket marketing certificate holders.

Market-Based Rates for Storage

In 2006 the Commission amended its regulations to establish criteria for obtaining market-based rates for storage services offered under 18 CFR 284.501–505. First, the Commission modified its market-power analysis to better reflect the competitive alternatives to storage. Second, pursuant to the Energy Policy Act of 2005, the Commission promulgated rules to implement section 4(f) of the Natural Gas Act, to permit underground natural gas storage service providers that are unable to show that they lack market power to negotiate market-based rates in circumstances where market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services, and where customers are adequately protected. These revisions are intended to facilitate the development of new natural gas storage capacity while protecting customers.

Action: The Commission is requesting a three-year extension of the FERC–549 reporting requirements, with no changes.

Burden Statement: The estimated annual public reporting burden is shown in the following table:

FERC–549 requirements & 18 CFR cite	Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1) × (2) × (3)
Semi-Annual Storage Reports for Interstates 284.13(e)	[3] 155	2	[4] 12	3,720
Transportation by Interstate Pipelines 284.102(e)	[5] 75	2	[6] 3	450
Rates and Charges for Intrastate Pipelines 284.123(b), (e)	[7] 67	1	[8] 12	804
Code of Conduct [9] (recordkeeping) 284.288, 403	222	1	1	222
Market-Based Rates [10] 284.501–505	2	1	350	700
Total				5,846

The total estimated annual cost burden to respondents is $339,068 (5,846 hours times $58/hour [11]).

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or

current expiration date is 9/30/2012). They are being moved to the FERC–549 in an effort to decrease the administrative effort involved in renewing data collections.

[2] 18 CFR 1c.1 and 1c.2, 71 FR 4,244 (2006).

[3] The number of pipelines in eTariff that are subject to the Natural Gas Act.

[4] This figure is based on the burden hours estimated in Docket No. RM09–2 (quarterly transportation and storage reports).

[5] The number of respondents annually is assumed to be approximately half of the number of interstate pipelines as estimated under the semi-annual storage report category.

[6] This is an estimate for the amount of time it requires to complete a one page document, which is what is essentially required by this part (one page from the shippers and one page from the intrastate or LDC, equaling an estimated 2 times a year).

[7] This figure is based on the number of filings under 18 CFR Part 284.123 filings over the past three years.

[8] This figure is based on the assumption that the effort required to make this revision to a tariff is approximately half of the effort required to make a baseline tariff filing (as computed in the Final Rule in Docket No. RM01–5).

[9] The estimates for this category come from the Commission's most recent renewal pertaining to this requirement.

[10] The estimates for this category are the same as were submitted to OMB when these requirements were last modified (in the Final Rule in Docket No. RM05–23).

[11] The per hour figures were obtained from the Bureau of Labor Statistics National Industry-Specific Occupational and Employment Wage Estimates (*http://www.bls.gov/oes/current/naics4_221200.htm*), and are based on the mean wage statistics for staff in the areas of management, business and financial, legal and administrative. The mean wage was then increased by 20% to account for benefits/overhead.

overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology e.g. permitting electronic submission of responses.

Dated: July 28, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19636 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14230–000]

George Wenschhof; Notice of Application Accepted for Filing and Soliciting Comments, Motions to Intervene, Protests, Recommendations, and Terms and Conditions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Conduit Exemption.

b. *Project No.:* 14230–000.

c. *Date filed:* July 15, 2011.

d. *Applicant:* George Wenschhof.

e. *Name of Project:* Meeker Wenschhof Hydroelectric Project.

f. *Location:* The proposed Meeker Wenschhof Project would be located on an existing irrigation pipeline in Rio Blanco County, Colorado. The land on which all the project structures are located is owned by the applicant.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Ryan Broshar, SRA International, 12600 Colfax Ave. W., Lakewood, CO 80304, (303) 233–1275.

i. *FERC Contact:* Christopher Chaney, (202) 502–6778, *christopher.chaney@ferc.gov.*

j. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

k. *Deadline for filing responsive documents:* Due to the small size of the proposed project, as well as the resource agency consultation letters filed with the application, the 60-day timeframe specified in 18 CFR 4.34(b) for filing all comments, motions to intervene, protests, recommendations, terms and conditions, and prescriptions is shortened to 30 days from the issuance date of this notice. All reply comments filed in response to comments submitted by any resource agency, Indian tribe, or person, must be filed with the Commission within 45 days from the issuance date of this notice.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under *http://www.ferc.gov/docs-filing/efiling.asp.* The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, it must also serve a copy of the document on that resource agency.

l. *Description of Project:* The Meeker Wenschhof Project would consist of: (1) A proposed powerhouse containing one proposed generating unit with an installed capacity of 23 kilowatts; and (2) appurtenant facilities. The applicant estimates the project would have an average annual generation of 100,000 kilowatt-hours.

m. This filing is available for review and reproduction at the Commission in the Public Reference Room, Room 2A, 888 First Street, NE., Washington, DC 20426. The filing may also be viewed on the web at *http://www.ferc.gov/docs-filing/elibrary.asp* using the ''eLibrary'' link. Enter the docket number, P–14230, in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for review and reproduction at the address in item h above.

n. *Development Application*—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

o. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a competing development application. A notice of intent must be served on the applicant(s) named in this public notice.

p. *Protests or Motions to Intervene*—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

q. All filings must (1) Bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''COMMENTS'', ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original

and seven copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Office of Energy Projects, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

r. *Waiver of Pre-filing Consultation:* On May 12, 2011, the applicant requested the agencies to support the waiver of the Commission's consultation requirements under 18 CFR 4.38(c). On May 31, 2011, the Colorado Division of Wildlife concurred with the request contingent upon the applicant providing additional information, which the applicant provided on July 13, 2011. On June 20, July 5, and July 7, 2011, the U.S. Fish and Wildlife Service, the Colorado Water Quality Control Division, and the Colorado Division of Water Resources, respectively, concurred with this request. No other comments regarding the request for waiver were received. Therefore, we intend to accept the consultation that has occurred on this project during the pre-filing period and we intend to waive pre-filing consultation under section 4.38(c), which requires, among other things, conducting studies requested by resource agencies, and distributing and consulting on a draft exemption application.

Dated: July 28, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19625 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–515–000]

Millennium Pipeline Company, LLC; Notice of Application

Take notice that on July 14, 2011, Millennium Pipeline Company, LLC (Millennium), One Blue Hill Plaza, Seventh Floor, P.O. Box 1565, Pearl River, New York 10965, filed in the above referenced docket an application pursuant to section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations, requesting authorization to construct, own and operate the Minisink Compressor Project, which consists of a new 12,260 horsepower compressor station, suction and discharge pipeline and related appurtenant facilities, all as more fully set forth in the application which is on file with the Commission and open to public inspection. These facilities will enable Millennium to increase firm deliveries to its interconnection with Algonquin Gas Transmission, LLC at Ramapo, New York from 450,000 Dth/day to approximately 675,000 Dth/day. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions concerning this application may be directed to Gary A. Kruse, Vice President-General Counsel & Secretary, Millennium Pipeline Company, LLC, One Blue Hill Plaza, Seventh Floor, P.O. Box 1565, Pearl River, New York 10965, by telephone at (845) 620–1300, by facsimile at (845) 620–1320, or by e-mail at *kruse@millenniumpipeline.com* or Joseph S. Koury, Wright & Talisman, P.C., 1200 G Street, NW., Suite 600, Washington, DC 20005, by telephone at (202) 393–1200, by facsimile at (202) 393–1240, or by e-mail at *koury@wrightlaw.com* or Ryan J. Collins, Wright & Talisman, P.C., 1200 G Street, NW., Suite 600, Washington, DC 20005, by telephone at (202) 393–1200, by facsimile at (202) 393–1240, or by e-mail at *collins@wrightlaw.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of

environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Motions to intervene, protests and comments may be filed electronically via the Internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: August 17, 2011.

Dated: July 27, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19632 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–2170–001.

Applicants: Florida Gas Transmission Company, LLC.

Description: Florida Gas Transmission Company, LLC submits tariff filing per 154.203: Future Contracting Compliance to be effective 12/5/2011.

Filed Date: 07/21/2011.

Accession Number: 20110721–5117.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 02, 2011.

Docket Numbers: RP10–896–001.

Applicants: Granite State Gas Transmission, Inc.

Description: Joint Petition of Granite State Gas Transmission, Inc., et al. for Approval of Settlement Amendment and Amendment to Stipulation and Agreement.

Filed Date: 07/26/2011.

Accession Number: 20110726–5092.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 02, 2011.

Docket Numbers: RP10–1006–002.

Applicants: Liberty Gas Storage, LLC.

Description: Liberty Gas Storage, LLC submits tariff filing per 154.203: Liberty Gas Storage LLC Compliance Filing to be effective 9/1/2011.

Filed Date: 07/22/2011.

Accession Number: 20110722–5103.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Docket Numbers: RP11–2236–001.

Applicants: Natural Gas Pipeline Company of America.

Description: Natural Gas Pipeline Company of America LLC submits tariff filing per 154.205(b): Amended Negotiated Rate Filing to be effective 7/1/2011.

Filed Date: 07/26/2011.

Accession Number: 20110726–5091.

Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

Docket Numbers: RP11–1736–001.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: Transcontinental Gas Pipe Line Company, LLC submits tariff filing per 154.203: Compliance Filing for GT&C Sections 2 and 18 (RP11–1736) to be effective 9/1/2011.

Filed Date: 07/25/2011.

Accession Number: 20110725–5106.

Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

Docket Numbers: RP11–2180–001.

Applicants: Transcontinental Gas Pipe Line Company.

Description: Transcontinental Gas Pipe Line Company, LLC submits tariff filing per 154.203: Compliance Filing—Revision to Volume No. 2 Table of Contents to be effective 5/19/2011.

Filed Date: 07/25/2011.

Accession Number: 20110725–5107.

Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive 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.

Dated: July 27, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19631 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–2295–000.

Applicants: Trailblazer Pipeline Company LLC.

Description: Trailblazer Pipeline Company LLC submits tariff filing per 154.403(d)(2): Tracking Filing—7/25/11 to be effective 9/1/2011.

Filed Date: 07/25/2011.

Accession Number: 20110725–5094.

Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

Docket Numbers: RP11–2296–000.

Applicants: Questar Pipeline Company.

Description: Questar Pipeline Company submits tariff filing per 154.204: Correction to Forms of Agreement to be effective 8/25/2011.

Filed Date: 07/26/2011.

Accession Number: 20110726–5034.

Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

Docket Numbers: RP11–2297–000.

Applicants: Paulsboro Natural Gas Pipeline Company LLC.

Description: Paulsboro Natural Gas Pipeline Company LLC submits tariff filing per 154.202: Baseline Tariff Filing to be effective 9/1/2011.

Filed Date: 07/26/2011.

Accession Number: 20110726–5059.

Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

Docket Numbers: RP11–2298–000.

Applicants: Questar Overthrust Pipeline Company.

Description: Report of Questar Overthrust Pipeline Company's Annual Fuel Gas Reimbursement Report.

Filed Date: 07/26/2011.

Accession Number: 20110726–5155.

Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

Docket Numbers: RP11–2299–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Gulf South Pipeline Company, LP submits tariff filing per 154.204: ETC 34688–19 Amendment to Negotiated Rate Agreement to be effective 8/1/2011.

Filed Date: 07/27/2011.

Accession Number: 20110727–5018.
Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

Docket Numbers: RP11–2300–000.
Applicants: East Tennessee Natural Gas, LLC.
Description: East Tennessee Natural Gas, LLC submits tariff filing per 154.203: NET Project Recourse Rates CP10–89–000 Compliance Filing to be effective 9/1/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5041.
Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

Docket Numbers: RP11–2301–000.
Applicants: East Tennessee Natural Gas, LLC.
Description: East Tennessee Natural Gas, LLC submits tariff filing per 154.204: NET Project—TVA Negotiated Rate to be effective 9/1/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5042.
Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

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.

Dated: July 27, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19630 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–2148–000.
Applicants: Sea Robin Pipeline Company, LLC.
Description: Supplemental Information of Sea Robin Pipeline Company, LLC.
Filed Date: 07/20/2011.
Accession Number: 20110720–5115.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 09, 2011.

Docket Numbers: RP11–2290–000.
Applicants: Natural Gas Pipeline Company of America.
Description: Natural Gas Pipeline Company of America LLC submits tariff filing per 154.204: Filing to Remove Expired Agreement to be effective 8/22/2011.
Filed Date: 07/22/2011.
Accession Number: 20110722–5061.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Docket Numbers: RP11–2291–000.
Applicants: Midcontinent Express Pipeline LLC.
Description: Midcontinent Express Pipeline LLC submits tariff filing per 154.204: Filing to Remove Expired Agreement and Revised Table of Contents to be effective 8/22/2011.
Filed Date: 07/22/2011.
Accession Number: 20110722–5080.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Docket Numbers: RP11–2292–000.
Applicants: Enbridge Offshore Pipelines (UTOS) LLC.
Description: Enbridge Offshore Pipelines (UTOS) LLC submits tariff filing per 154.204: IT Contract Terms to be effective 8/15/2011.
Filed Date: 07/22/2011.
Accession Number: 20110722–5081.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Docket Numbers: RP11–2293–000.
Applicants: Florida Gas Transmission Company, LLC.
Description: Florida Gas Transmission Company, LLC submits tariff filing per 154.204: Flex Fuel Filing on 7–22–11 to be effective 8/1/2011.
Filed Date: 07/22/2011.
Accession Number: 20110722–5117.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Docket Numbers: RP11–2294–000.
Applicants: Southern LNG Company, L.L.C.
Description: Southern LNG Company, L.L.C. submits tariff filing per 154.203: Rate Schedule LNG–3 Compliance Filing to be effective 8/1/2010.
Filed Date: 07/22/2011.
Accession Number: 20110722–5124.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

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 dockets(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.

Dated: July 25, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19629 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–2794–002.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35: 07–28–11 Reserve Procurement Compliance to be effective 4/1/2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5092.

Comment Date: 5 p.m. Eastern Time on Thursday, August 18, 2011.

Docket Numbers: ER11–3445–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC's response to Commission's July 8, 2011 request for additional information.

Filed Date: 07/22/2011.

Accession Number: 20110722–5162.

Comment Date: 5 p.m. Eastern Time on Friday, August 12, 2011.

Docket Numbers: ER11–3959–001.

Applicants: Post Rock Wind Power Project, LLC.

Description: Post Rock Wind Power Project, LLC submits tariff filing per 35.17(b): Amendment to Market-Based Rate Application to be effective 8/29/2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5002.

Comment Date: 5 p.m. Eastern Time on Thursday, August 18, 2011.

Docket Numbers: ER11–4136–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 1911R1 Kansas City Power & Light Co. LGIA to be effective 6/27/2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5000.

Comment Date: 5 p.m. Eastern Time on Thursday, August 18, 2011.

Docket Numbers: ER11–4137–000.

Applicants: Alcoa Power Generating Inc.

Description: Alcoa Power Generating Inc. submits tariff filing per 35.15: Cancellation of Tariff ID for APGI CRT June 2011 Agreement to be effective 7/28/2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5086.

Comment Date: 5 p.m. Eastern Time on Thursday, August 18, 2011.

Docket Numbers: ER11–4138–000.

Applicants: Alcoa Power Generating Inc.

Description: Alcoa Power Generating Inc. submits tariff filing per 35.15: Cancellation of Tariff ID for APGI Rate Schedule 13 to be effective 7/28/2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5088.

Comment Date: 5 p.m. Eastern Time on Thursday, August 18, 2011.

Docket Numbers: ER11–4139–000.

Applicants: Alcoa Power Generating Inc.

Description: Alcoa Power Generating Inc. submits tariff filing per 35.1: Resubmission of APGI Rate Schedule 13 and June 2011 Supplemental TSA to be effective 7/28/2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5090.

Comment Date: 5 p.m. Eastern Time on Thursday, August 11, 2011.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–2–000.

Applicants: Spring Canyon Energy LLC, Judith Gap Energy LLC, Invenergy TN LLC, Wolverine Creek Energy LLC, Grays Harbor Energy LLC, Forward Energy LLC, Willow Creek Energy LLC, Sheldon Energy LLC, Hardee Power Partners Limited, Spindle Hill Energy LLC, Invenergy Cannon Falls LLC, Beech Ridge Energy LLC, Grand Ridge Energy LLC, Grand Ridge Energy II LLC, Grand Ridge Energy III LLC, Grand Ridge Energy IV LLC, Grand Ridge Energy V LLC, VantageWind Energy LLC.

Description: Generation Site Report Second Quarter 2011 of Spring Canyon Energy LLC, et al.

Filed Date: 07/28/2011.

Accession Number: 20110728–5049.

Comment Date: 5 p.m. Eastern Time on Thursday, August 18, 2011.

Docket Numbers: LA11–2–000.

Applicants: PPL Montana, LLC, Kentucky Utilities Company, PPL Electric Utilities Corporation, Louisville Gas and Electric Company, PPL Colstrip I, LLC, PPL Colstrip II, LLC, Lower Mount Bethel Energy, LLC, PPL Montour, LLC, PPL Susquehanna, LLC, PPL Holtwood, LLC, PPL Brunner Island, LLC, PPL Maine, LLC, PPL Martins Creek, LLC, PPL Great Works, LLC, PPL New Jersey Biogas, LLC, PPL New Jersey Solar, LLC, PPL Renewable Energy, LLC, PPL EnergyPlus, LLC, LG&E Energy Marketing, Inc.

Description: Quarterly Site Acquisition Report of the PPL Companies for the second quarter 2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5073.

Comment Date: 5 p.m. Eastern Time on Thursday, August 18, 2011.

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.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant

to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

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.

Dated: July 28, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19628 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–78–003.
Applicants: Orange Grove Energy, L.P.
Description: J–Power North America Holdings Co. Ltd Supplemental Filing of Notification of Non-Material Change in Status Orange Grove Energy, L.P.
Filed Date: 07/14/2011.
Accession Number: 20110714–5038.
Comment Date: 5 p.m. Eastern Time on Thursday, August 04, 2011.

Docket Numbers: ER11–3987–001.
Applicants: Mesquite Solar 1, LLC.
Description: Mesquite Solar 1, LLC submits tariff filing per 35.17(b): Mesquite Solar 1 LLC Market-Based Rates Tariff Supplement to be effective 7/27/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5085.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: ER11–4027–000; ER11–4028–000.
Applicants: James River Genco, LLC, Portsmouth Genco, LLC.
Description: Supplemental Information of James River Genco, LLC, *et al.*
Filed Date: 07/27/2011.
Accession Number: 20110727–5056.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4122–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: E&P Agreements under PG&E's Wholesale Distribution Tariff to be effective 8/6/2010.
Filed Date: 07/27/2011.
Accession Number: 20110727–5000.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4123–000.
Applicants: Duke Energy Carolinas, LLC.
Description: Duke Energy Carolinas, LLC submits tariff filing per 35.13(a)(2)(iii: Additional TSAs 205 Filing to be effective 6/1/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5014.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4124–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Michigan Electric Transmission Company, LLC submits tariff filing per 35.13(a)(1): Filing of Wolverine Service Agreement to be effective 9/27/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5019.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4126–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits tariff filing per 35.13(a)(2)(iii: 2011–07–27 Pseudo-Tie PGA and Termination Notice to be effective 8/19/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5057.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4127–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Michigan Electric Transmission Company, LLC submits tariff filing per 35.13(a)(1): Filing of Agency Agreement with Consumers Energy to be effective 9/27/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5058.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4128–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Michigan Electric Transmission Company, LLC submits tariff filing per 35.13(a)(1): Filing of Agency Agreement with Consumers Energy to be effective 9/27/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5059.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4129–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Michigan Electric Transmission Company, LLC submits tariff filing per 35.13(a)(1): Filing of Agency Agreement with Consumers Energy to be effective 9/27/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5060.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4130–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Michigan Electric Transmission Company, LLC submits tariff filing per 35.13(a)(1): Filing of Agency Agreement with Consumers Energy to be effective 9/27/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5061.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4131–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Michigan Electric Transmission Company, LLC submits tariff filing per 35.13(a)(1): Filing of Agency Agreement with Consumers Energy to be effective 9/27/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5067.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4132–000.
Applicants: Upper Peninsula Power Company.
Description: Upper Peninsula Power Company submits tariff filing per 35.12: Metering Agent Agreement between WPPI, L'Anse & UPPCO to be effective 10/1/2011.
Filed Date: 07/27/2011.

Accession Number: 20110727–5071.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4133–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Queue No. W4–080; Original Service Agreement No. 2974 to be effective 6/29/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5083.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4134–000.
Applicants: Florida Power Corporation.
Description: Florida Power Corporation submits tariff filing per 35.13(a)(2)(iii: Rate Schedule No. 212 of Florida Power Corporation to be effective 8/1/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5094.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: ER11–4135–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Queue Position No. V3–030—Original Service Agreement No. 2971 to be effective 6/28/2011.
Filed Date: 07/27/2011.
Accession Number: 20110727–5112.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–2–000.

Applicants: The Detroit Edison Company.
Description: Quarterly Report Regarding Site Control of The Detroit Edison Company.
Filed Date: 07/27/2011.
Accession Number: 20110727–5084.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Docket Numbers: LA11–2–000.
Applicants: Astoria Generating Company, L.P.
Description: Quarterly Land Acquisition Report of Astoria Generating Company, L.P.
Filed Date: 07/27/2011.
Accession Number: 20110727–5125.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

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.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

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.

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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.

Dated: July 28, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19627 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:
Docket Numbers: EG11–114–000.
Applicants: TPW Petersburg, LLC.
Description: Self-Certification of Exempt Wholesale Generator Status of TPW Petersburg, LLC.
Filed Date: 07/26/2011.
Accession Number: 20110726–5110.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Take notice that the Commission received the following electric rate filings:
Docket Numbers: ER11–3795–001.
Applicants: Interstate Power and Light Company.
Description: Interstate Power and Light Company submits tariff filing per 35.17(b): IPL & Elk Wind Energy—LBA Agreement Amendment to be effective 6/14/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5037.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–3800–001.
Applicants: Interstate Power and Light Company.
Description: Interstate Power and Light Company submits tariff filing per 35.17(b): IPL & Lakefield Wind Project—LBA Agreement Amendment to be effective 6/15/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5038.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4102–001.
Applicants: Public Service Company of New Mexico.
Description: Public Service Company of New Mexico submits tariff filing per 35: OATT Section 23 Revision 2 Substitute to be effective 9/21/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5001.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4112–000.
Applicants: Southwestern Electric Power Company.
Description: Southwestern Electric Power Company submits tariff filing per 35.13(a)(2)(iii: 20110726 Rayburn PSA to be effective 12/17/2010.
Filed Date: 07/26/2011.
Accession Number: 20110726–5040.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4113–000.
Applicants: Constellation NewEnergy, Inc.
Description: Constellation NewEnergy, Inc. submits tariff filing per 35.13(a)(2)(iii: Revised MBR Tariff Effective 7–27–2011 to be effective 7/27/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5046.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4114–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: Modifications to Remove the RMS Agreement from LGIA, Attachment H to WD Tariff to be effective 9/30/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5062.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4115–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Michigan Electric Transmission Company, LLC submits tariff filing per 35.13(a)(2)(iii: Notice of Succession to Transmission Agreement with County of Antrim to be effective 9/26/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5065.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4116–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Michigan Electric Transmission Company, LLC submits tariff filing per 35.13(a)(2)(iii: Filing of Amended and Restated Facilities Agreement to be effective 9/26/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5068.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4117–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Michigan Electric Transmission Company, LLC submits tariff filing per 35.13(a)(2)(iii: Filing of Amended and Restated Marshall Facilities Agreement to be effective 9/26/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5077.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4118–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Michigan Electric Transmission Company, LLC submits tariff filing per 35.13(a)(1): Filing of Letter Agreement with MSCPA to be effective 9/26/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5082.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4119–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: Michigan Electric Transmission Company, LLC submits tariff filing per 35.13(a)(1): Filing of Letter Agreement with Presque Isle County to be effective 9/26/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5085.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4120–000.
Applicants: FFC Energy, LLC.
Description: FFC Energy, LLC submits tariff filing per 35.12: FFC Market Based Rate Tariff to be effective 9/30/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5093.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4121–000.
Applicants: ALLETE, Inc., Midwest Independent Transmission System Operator, Inc.
Description: ALLETE, Inc. submits tariff filing per 35.13(a)(2)(iii: Allete-Bison LGIAs to be effective 7/27/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5129.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4121–000.
Applicants: ALLETE, Inc., Midwest Independent Transmission System Operator, Inc.
Description: ALLETE, Inc. submits tariff filing per 35.13(a)(2)(iii: Allete-Bison LGIAs to be effective 7/27/2011.
Filed Date: 07/26/2011.
Accession Number: 20110726–5130.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

Docket Numbers: ER11–4125–000.
Applicants: Xcel Energy Services Inc., Southwestern Public Service Company.
Description: Southwestern Public Service Company's Notice of Termination of Master Commodity Purchase and Sale Agreement with Reliant Energy Service, Inc.
Filed Date: 07/27/2011.
Accession Number: 20110727–5044.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 17, 2011.

Take notice that the Commission received the following land acquisition reports:
Docket Numbers: LA11–2–000.
Applicants: CinCap IV, LLC, CinCap V, LLC, Duke Energy Commercial Asset Management, Inc., Duke Energy Commercial Enterprises, Inc., Duke Midwest Operating Companies, Duke Energy Carolinas, LLC, Duke Energy Fayette II, LLC, Duke Energy Hanging Rock II, LLC, Duke Energy Indiana, Inc., Duke Energy Kentucky, Inc., Duke Energy Lee II, LLC., Duke Energy Ohio, Inc., Duke Energy Retail Sales, LLC, Duke Energy Trading and Marketing, LLC, Duke Energy Vermillion II, LLC, Duke Energy Washington II, LLC, Happy Jack Windpower, LLC, North Allegheny Wind, LLC, Silver Sage Windpower, LLC, St. Paul Cogeneration, LLC, Three Buttes Windpower, LLC, Kit Carson Windpower, LLC, Top of the World Energy, LLC.
Description: Report of Duke Energy Corporation under LA11–2.
Filed Date: 07/26/2011.
Accession Number: 20110726–5149.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 16, 2011.

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.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets

the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

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.

Dated: July 27, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19626 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12740–003–VA]

Jordan Hydroelectric Limited Partnership; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed the application for an original license for the 3.0-megawatt (MW) Flannagan Hydroelectric Project located on the Pound River, at the U.S. Army Corps of Engineers' (Corps) John W. Flannagan Dam and Reservoir, near the Town of Clintwood, in Dickenson County, Virginia, and has prepared an Environmental Assessment (EA). The proposed project would occupy approximately 1 acre of federal land managed by the Corps.

In the EA, Commission staff analyzed the potential environmental effects of licensing the project and conclude that issuing a license for the project, with appropriate environmental measures, would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the EA is on file with the Commission and is available for public inspection. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Comments on the EA should be filed within 30 days from the issuance date of this notice, and should be addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1–A, Washington, DC 20426. Please affix ''Flannagan Hydroelectric Project No. 12740–003'' to all comments. Comments may be filed electronically via Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's website under the ''eFiling'' link. For further information contact Gaylord Hoisington by telephone at (202) 502–6032 or by e-mail at *gaylord.hoisington@ferc.gov*.

Dated: July 27, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19637 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER11–2875–001; ER11–2875–002; Docket No. EL11–20–001]

PJM Interconnection, L.L.C.; PJM Power Providers Group v. PJM Interconnection, L.L.C.; Notice Establishing Post-Technical Comment Period

As indicated in the June 29, 2011 Notice in these dockets, comments on the technical conference that was held on July 28, 2011, to discuss issues related to PJM Interconnection, L.L.C. (PJM)'s Minimum Offer Price Rule (MOPR) and resources designed as ''self supply,'' [1] are due 21 days from the date of this conference, or Thursday, August 18, 2011.

Dated: July 28, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19633 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–4120–000]

FFC Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of FFC Energy, LLC's application for market-based rate authority, with an accompanying rate tariff, noting That such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and

[1] *PJM Interconnection, L.L.C.,* 135 FERC ¶ 61,228 (2011).

assumptions of liability, is August 16, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding 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 dockets(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.

Dated: July 27, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–19634 Filed 8–2–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2010–1011; FRL–8880–6]

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR, entitled: ''Pre-Manufacture Review Reporting and Exemption Requirements for New Chemical Substances and Significant New Use Reporting Requirements for Chemical Substances'' and identified by EPA ICR No. 0574.15 and OMB Control No. 2070–0012, is scheduled to expire on December 31, 2011. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection.

DATES: Comments must be received on or before September 30, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2010–1011, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery*: OPPT Document Control Office (DCO), EPA East, Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. *Attention*: Docket ID Number EPA–HQ–OPPT–2010–1011. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2010–1011. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For technical information contact*: Greg Schweer, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number*: (202) 564–8469; *fax number:* (202) 564–4775; *e-mail address*: *schweer.greg@epa.gov.*

For general information contact: The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; *telephone number:* (202) 554–1404; *e-mail address: TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of PRA, EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including

whether the information will have practical utility.

2. Evaluate the accuracy of the Agency's estimates of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

3. Enhance the quality, utility, and clarity of the information to be collected.

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the collection activity.

7. Make sure to submit your comments by the deadline identified under **DATES**.

8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

III. What information collection activity or ICR does this action apply to?

Affected entities: Entities potentially affected by this ICR are companies that manufacture, process or import chemical substances.

Title: Pre-Manufacture Review Reporting and Exemption Requirements for New Chemical Substances and Significant New Use Reporting Requirements for Chemical Substances.

ICR numbers: EPA ICR No. 0574.15, OMB Control No. 2070–0012.

ICR status: This ICR is currently scheduled to expire on December 31, 2011. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Section 5 of the Toxic Substances Control Act (TSCA) requires manufacturers and importers of new chemical substances to submit to EPA notice of intent to manufacture or import a new chemical substance 90 days before manufacture or import begins. EPA reviews the information contained in the notice to evaluate the health and environmental effects of the new chemical substance. On the basis of the review, EPA may take further regulatory action under TSCA, if warranted. If EPA takes no action within 90 days, the submitter is free to manufacture or import the new chemical substance without restriction.

TSCA section 5 also authorizes EPA to issue Significant New Use Rules (SNURs). EPA uses this authority to take follow-up action on new or existing chemicals that may present an unreasonable risk to human health or the environment if used in a manner that may result in different and/or higher exposures of a chemical to humans or the environment. Once a use is determined to be a significant new use, persons must submit a notice to EPA 90 days before beginning manufacture, processing or importation of a chemical substance for that use. Such a notice allows EPA to receive and review information on such a use and, if necessary, regulate the use before it occurs.

Finally, TSCA section 5 also permits applications for exemption from section 5 review under certain circumstances. An applicant must provide information sufficient for EPA to make a determination that the circumstances in question qualify for an exemption. In granting an exemption, EPA may impose appropriate restrictions.

This information collection addresses the reporting and recordkeeping requirements associated with TSCA section 5.

Responses to the collection of information are mandatory (see 40 CFR parts 700, 720, 721, 723 and 725). Respondents may claim all or part of a document confidential. EPA will disclose information that is covered by a claim of confidentiality only to the extent permitted by, and in accordance with, the procedures in TSCA section 14 and 40 CFR part 2.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to range between 1.5 hours and 84.8 hours per response depending upon the type of response. Burden is defined in 5 CFR 1320.3(b).

The ICR provides a detailed explanation of this estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 443.

Frequency of response: On occasion.

Estimated total average number of responses for each respondent: 4.8.

Estimated total annual burden hours: 120,316 hours.

Estimated total annual costs: $34,417,821. This includes an estimated burden cost of $34,417,821 and an estimated cost of $0 for capital investment or maintenance and operational costs.

IV. Are there changes in the estimates from the last approval?

There is a decrease of 34,006 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. This decrease reflects EPA's re-estimate in the number of annual submissions to reflect the Agency's experience since the most recent ICR renewal. The decrease in the number of annual submissions is largely associated with the finalization of the e-PMN rule in 2010. This change is an adjustment.

V. What is the next step in the process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Reporting and recordkeeping requirements.

Dated: July 25, 2011.

Stephen A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2011–19418 Filed 8–2–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0882; FRL–8882–3]

Butylate; Registration Review Proposed Decision; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's proposed registration review decision for the pesticide butylate and opens a public comment period on the proposed decision. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, that the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

DATES: Comments must be received on or before October 3, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0882, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket identification (ID) number EPA–HQ–OPP–2008–0882. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* 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 in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: *For pesticide specific information, contact:* Steven Snyderman, Chemical Review Manager, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 347–0249; *fax number:* (703) 308–7070; *e-mail address: snyderman.steven@epa.gov.*

For general information on the registration review program, contact: Kevin Costello, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 305–5026; *fax number:* (703) 308–8090; *e-mail address: costello.kevin@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the chemical review manager listed under **FOR FURTHER INFORMATION CONTACT.**

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a

Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What action is the agency taking?

Pursuant to 40 CFR 155.58, this notice announces the availability of EPA's proposed registration review decision for the pesticide shown in the following table, and opens a 60-day public comment period on the proposed decision. Butylate is a thiocarbamate, soil-incorporated herbicide and was registered for use on field corn, pop corn, and sweet corn. The last butylate pesticide product registered for use in the United States was terminated on March 23, 2011.

TABLE—REGISTRATION REVIEW PROPOSED FINAL DECISIONS

Registration Review Case Name and No.	Pesticide Docket ID No.	Chemical review manager, telephone No., e-mail address
Butylate, 0071	EPA–HQ–OPP–2008–0882.	Steven Snyderman, (703) 347–0249, *snyderman.steven@epa.gov.*

The registration review docket for a pesticide includes earlier documents related to the registration review of the case. For example, the review opened with the posting of a Summary Document, containing a Preliminary Work Plan, for public comment. A Final Work Plan was posted to the docket following public comment on the initial docket.

As stated in the documents in the initial butylate registration review docket, the Agency had intended to revise the existing risk assessments for butylate. However, after publication of the butylate Final Work Plan, pursuant to Section 4(i)(5)(G) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, the Agency issued a cancellation order, dated July 14, 2010, to the technical registrant Tri-Ag, Inc., cancelling their butylate registrations for non-payment of annual registration maintenance fees, which were due January 15, 2010. This cancellation order established July 14, 2010 as the effective cancellation date for Tri-Ag, Inc.'s butylate registrations. Further, the Agency announced the issuance of the cancellation order for non-payment of year 2010 registration maintenance fees for butylate products in the **Federal Register** on July 28, 2010 (75 FR 44240; FRL–8835–2). For the remaining butylate product registrations, pursuant to Section 6(f)(1) of FIFRA, as amended, the Agency announced receipt of a request from the end-use registrant, Arysta Lifescience North America, LLC, to voluntarily cancel the last butylate product registration; and then granted this voluntary cancellation request, establishing March 23, 2011, as the effective cancellation date for the last butylate product registered for use in the United States, as published in the **Federal Register** on March 23, 2011 (76 FR 16147, FRL–8867–8). Due to the cancellation orders issued affecting the last remaining butylate product registrations in the United States, the Agency has found that it is not necessary to conduct new risk assessments for butylate and is, therefore, issuing a proposed decision pursuant to 40 CFR 155.58. The Agency believes that mitigation measures put into effect on product labeling through the reregistration process are adequate to protect human health and the environment until existing stocks of butylate are exhausted. This proposed registration review decision is described in more detail in the *Butylate Proposed Registration Review Decision,* available in the butylate docket. Following public comment, the Agency will issue a final registration review decision for products containing butylate.

The registration review program is being conducted under congressionally-mandated time frames, and EPA recognizes the need both to make timely decisions and to involve the public. Section 3(g) of FIFRA, as amended, required EPA to establish by regulation procedures for reviewing pesticide registrations, originally with a goal of reviewing each pesticide's registration every 15 years to ensure that a pesticide continues to meet the FIFRA standard for registration. The Agency's final rule to implement this program was issued in August 2006 and became effective in October 2006, and appears at 40 CFR part 155, subpart C. The Pesticide Registration Improvement Act of 2003 (PRIA) was amended and extended in September 2007. FIFRA, as amended by PRIA in 2007, requires EPA to complete registration review decisions by October 1, 2022, for all pesticides registered as of October 1, 2007.

The registration review final rule at 40 CFR 155.58(a) provides for a minimum 60-day public comment period on all proposed registration review decisions. This comment period is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the proposed decision. All comments should be submitted using the methods in **ADDRESSES**, and must be received by EPA on or before the closing date. These comments will become part of the docket for butylate. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

The Agency will carefully consider all comments received by the closing date and will provide a ''Response to Comments Memorandum'' in the docket. The final registration review decision will explain the effect that any comments had on the decision and provide the Agency's response to significant comments.

Background on the registration review program is provided at: *http://www.epa.gov/oppsrrd1/registration_review.* Links to earlier documents related to the registration review of this pesticide are provided at: *http://www.epa.gov/oppsrrd1/registration_review/butylate/.*

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

Section 3(g) of FIFRA and 40 CFR part 155, subpart C, provide authority for this action.

List of Subjects

Environmental protection, Administrative practice and procedure, Pesticides pest, and butylate.

Dated: July 25, 2011.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2011–19691 Filed 8–2–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–UST–2010–0651; FRL–9447–3]

Compatibility of Underground Storage Tank Systems With Biofuel Blends; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; correction.

SUMMARY: This document contains a typographical correction to the guidance which was published in the **Federal Register** of Tuesday, July 5, 2011. The guidance described how owners and operators of underground storage tanks (USTs) can demonstrate compliance with the Federal compatibility requirement for UST systems storing gasoline greater than 10 percent ethanol or diesel containing greater than 20 percent biodiesel. That guidance contained a typographical error which this action corrects. The complete, corrected version of the guidance can be found on EPA's Web site.

FOR FURTHER INFORMATION CONTACT: Andrea Barbery, (703) 603–7137.

Correction

In the **Federal Register** of July 5, 2011, in 76 FR 39095, on page 39100, in the second column, correct the fourth paragraph under ''IV. Final Guidance'' to read:

The discussion in this document is intended solely as guidance. The statutory provisions and EPA regulations described in this document contain legally binding requirements. This document is not a regulation itself, nor does it change or substitute for those provisions and regulations. Thus, it does not impose legally binding requirements on EPA, states, or the regulated community.

Dated: July 28, 2011.

Mathy Stanislaus,

Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 2011–19682 Filed 8–2–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9447–2]

Cross-Media Electronic Reporting: Authorized Program Revision Approvals, Commonwealth of Kentucky

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of the Commonwealth of Kentucky's request to revise certain of its EPA-authorized programs to allow electronic reporting.

DATES: EPA's approval is effective August 3, 2011.

FOR FURTHER INFORMATION CONTACT: Evi Huffer, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 566–1697, *huffer.evi@epa.gov,* U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, or Karen Seeh, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 566–1175, *seeh.karen@epa.gov.*

SUPPLEMENTARY INFORMATION: On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Under subpart D of CROMERR, state, tribe or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and obtain EPA approval. Subpart D also provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, in § 3.1000(b) through (e) of 40 CFR part 3, subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the state, tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable subpart D requirements.

On December 20, 2010, the Kentucky Department for Environmental Protection (KY DEP) submitted an application for its Net Discharge Monitoring Report (NetDMR) electronic document receiving system for revision/modification of its EPA-authorized programs under title 40 CFR. EPA reviewed KY DEP's request to revise its EPA-authorized programs and, based on this review, EPA determined that the application met the standards for approval of authorized program revisions/modifications set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve Kentucky's request for revision to its 40 CFR Part 123– National Pollutant Discharge Elimination System (NPDES) State Program Requirements and part 403– General Pretreatment Regulations For Existing And New Sources Of Pollution EPA-authorized programs for electronic reporting of discharge monitoring report information submitted under 40 CFR parts 122 and 403 is being published in the **Federal Register.**

KY DEP was notified of EPA's determination to approve its application with respect to the authorized programs listed above.

Dated: July 28, 2011.

Arnold E. Layne,

Acting Director, Office of Information Collection.

[FR Doc. 2011–19696 Filed 8–2–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0582; FRL–8881–9]

FIFRA Scientific Advisory Panel; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: There will be a 2-day consultation meeting of the Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel (FIFRA SAP) to consider and review scientific issues concerning the Two-dimensional

Exposure Rainfall-Runoff Assessment (TERRA) Watershed Model and its use in the FIFRA Ecological Risk Assessment for Antimicrobial Uses of Copper.

DATES: The meeting will be held on October 25–26, 2011, from approximately 9 a.m. to 5:30 p.m.

Comments. The Agency encourages that written comments be submitted by October 11, 2011, and requests for oral comments be submitted by October 18, 2011. However, written comments and requests to make oral comments may be submitted until the date of the meeting, but anyone submitting written comments after October 11, 2011, should contact the Designated Federal Official (DFO) listed under **FOR FURTHER INFORMATION CONTACT**. For additional instructions, see Unit I.C. of the **SUPPLEMENTARY INFORMATION**.

Nominations. Nominations of candidates to serve as ad hoc members of FIFRA SAP for this meeting should be provided on or before August 17, 2011.

Webcast. This meeting may be webcast. Please refer to the FIFRA SAP's Web site, *http://www.epa.gov/scipoly/SAP* for information on how to access the webcast. Please note that the webcast is a supplementary public process provided only for convenience. If difficulties arise resulting in webcasting outages, the meeting will continue as planned.

Special accommodations. For information on access or services for individuals with disabilities, and to request accommodation of a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held at the Environmental Protection Agency, Conference Center, Lobby Level, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA 22202.

Comments: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2011–0582, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility 's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2011–0582. If your comments contain any information that you consider to be CBI or otherwise protected, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting your comments. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* 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 in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

Nominations, requests to present oral comments, and requests for special accommodations: Submit nominations to serve as ad hoc members of FIFRA SAP, requests for special seating accommodations, or requests to present oral comments to the DFO listed under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Fred Jenkins, Jr., DFO, Office of Science Coordination and Policy (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (202) 564–3327; *fax number:* (202) 564–8382; *e-mail address: jenkins.fred@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act, FIFRA, and the Food Quality Protection Act of 1996 (FQPA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

C. How may I participate in this meeting?

You may participate in this meeting by following the instructions in this unit. To ensure proper receipt by EPA, it is imperative that you identify docket ID number EPA–HQ–OPP–2011–0582 in the subject line on the first page of your request.

1. *Written comments.* The Agency encourages that written comments be submitted, using the instructions in **ADDRESSES**, no later than October 11, 2011, to provide FIFRA SAP the time necessary to consider and review the written comments. Written comments are accepted until the date of the meeting, but anyone submitting written comments after October 11, 2011, should contact the DFO listed under **FOR FURTHER INFORMATION CONTACT.** Anyone submitting written comments at the meeting should bring 30 copies for distribution to FIFRA SAP.

2. *Oral comments.* The Agency encourages that each individual or group wishing to make brief oral comments to FIFRA SAP submit their request to the DFO listed under **FOR FURTHER INFORMATION CONTACT** no later than October 18, 2011, in order to be included on the meeting agenda. Requests to present oral comments will be accepted until the date of the meeting and, to the extent that time permits, the Chair of FIFRA SAP may permit the presentation of oral comments at the meeting by interested persons who have not previously requested time. The request should identify the name of the individual making the presentation, the organization (if any) the individual will represent, and any requirements for audiovisual equipment (*e.g.,* overhead projector, 35 mm projector, chalkboard). Oral comments before FIFRA SAP are limited to approximately 5 minutes unless prior arrangements have been made. In addition, each speaker should bring 30 copies of his or her comments and presentation slides for distribution to the FIFRA SAP at the meeting.

3. *Seating at the meeting.* Seating at the meeting will be open and on a first-come basis.

4. *Request for nominations to serve as ad hoc members of FIFRA SAP for this meeting.* As part of a broader process for developing a pool of candidates for each meeting, FIFRA SAP staff routinely solicits the stakeholder community for nominations of prospective candidates for service as ad hoc members of FIFRA SAP. Any interested person or organization may nominate qualified individuals to be considered as prospective candidates for a specific meeting. Individuals nominated for this meeting should have expertise in one or more of the following areas: Watershed modeling, pesticide exposure modeling, environmental fate science including hydrology, soil science and chemistry, Geographic Information Systems, and urban pesticide exposure modeling. Nominees should be scientists who have sufficient professional qualifications, including training and experience, to be capable of providing expert comments on the scientific issues for this meeting. Nominees should be identified by name, occupation, position, address, and telephone number. Nominations should be provided to the DFO listed under **FOR FURTHER INFORMATION CONTACT** on or before August 17, 2011. The Agency will consider all nominations of prospective candidates for this meeting that are received on or before this date. However, final selection of ad hoc members for this meeting is a discretionary function of the Agency.

The selection of scientists to serve on FIFRA SAP is based on the function of the panel and the expertise needed to address the Agency's charge to the panel. No interested scientists shall be ineligible to serve by reason of their membership on any other advisory committee to a Federal department or agency or their employment by a Federal department or agency except the EPA. Other factors considered during the selection process include availability of the potential panel member to fully participate in the panel's reviews, absence of any conflicts of interest or appearance of lack of impartiality, independence with respect to the matters under review, and lack of bias. Although financial conflicts of interest, the appearance of lack of impartiality, lack of independence, and bias may result in disqualification, the absence of such concerns does not assure that a candidate will be selected to serve on FIFRA SAP. Numerous qualified candidates are identified for each panel. Therefore, selection decisions involve carefully weighing a number of factors including the candidates' areas of expertise and professional qualifications and achieving an overall balance of different scientific perspectives on the panel. In order to have the collective breadth of experience needed to address the Agency's charge for this meeting, the Agency anticipates selecting approximately 10 ad hoc scientists.

FIFRA SAP members are subject to the provisions of 5 CFR part 2634, Executive Branch Financial Disclosure, as supplemented by the EPA in 5 CFR part 6401. In anticipation of this requirement, prospective candidates for service on the FIFRA SAP will be asked to submit confidential financial information which shall fully disclose, among other financial interests, the candidate's employment, stocks and bonds, and where applicable, sources of research support. The EPA will evaluate the candidates financial disclosure form to assess whether there are financial conflicts of interest, appearance of a lack of impartiality or any prior involvement with the development of the documents under consideration (including previous scientific peer review) before the candidate is considered further for service on FIFRA SAP. Those who are selected from the pool of prospective candidates will be asked to attend the public meetings and to participate in the discussion of key issues and assumptions at these meetings. In addition, they will be asked to review and to help finalize the meeting minutes. The list of FIFRA SAP members participating at this meeting will be posted on the FIFRA SAP Web site at *http://epa.gov/scipoly/sap* or may be obtained from the OPP Regulatory Public Docket at *http://www.regulations.gov.*

II. Background

A. Purpose of FIFRA SAP

FIFRA SAP serves as the primary scientific peer review mechanism of EPA's Office of Chemical Safety and Pollution Prevention (OCSPP) and is structured to provide scientific advice, information and recommendations to the EPA Administrator on pesticides and pesticide-related issues as to the impact of regulatory actions on health and the environment. FIFRA SAP is a Federal advisory committee established in 1975 under FIFRA that operates in accordance with requirements of the Federal Advisory Committee Act. FIFRA SAP is composed of a permanent panel consisting of seven members who are appointed by the EPA Administrator from nominees provided by the National Institutes of Health and the National Science Foundation. FIFRA, as amended by FQPA, established a Science Review Board consisting of at least 60 scientists who are available to the SAP on an ad hoc basis to assist in reviews conducted by the SAP. As a peer review mechanism, FIFRA SAP

provides comments, evaluations and recommendations to improve the effectiveness and quality of analyses made by Agency scientists. Members of FIFRA SAP are scientists who have sufficient professional qualifications, including training and experience, to provide expert advice and recommendation to the Agency.

B. Public Meeting

EPA's Office of Pesticide Programs performs ecological risk assessments under the authority provided in FIFRA, as amended by the FQPA, to ensure that a pesticide does not pose any unreasonable risks to the environment. The Agency utilizes a combination of data submitted by pesticide manufacturers, open literature, and computer models to conduct risk assessments and to evaluate the potential hazards posed by a pesticide to non-target species and the environment. Models are an essential part of the risk assessment process because they allow the Agency to perform nationwide environmental exposure assessments in the absence of nationwide spatially explicit monitoring data for each chemical.

The most recent ecological risk assessment for antimicrobial uses of copper, completed in 2010 as part of its reregistration process, used the ''Biotic Ligand Model'' to estimate aqueous exposures from wood preservative and roofing shingle uses and the ''Marine Antifoulant Model to Predict Environmental Concentrations'' (MAM–PEC Model; version 2) to evaluate exposure from antifoulant uses of copper. The Agency anticipates conducting a complete ecological risk assessment, including an endangered species assessment, for all pesticidal uses of copper through its registration review process. The Final Work Plan for the registration review of copper was published in March 2011. Documents related to the reregistration and registration review of copper can be found at regulations.gov in dockets EPA–HQ–OPP–2005–0558 and EPA–HQ–OPP–2010–0212, respectively.

The TERRAWatershed Model has been proposed by the American Chemistry Council as a refined model for estimating environmental exposure from the use of copper as an antimicrobial pesticide. The TERRA Model uses a generalized watershed rainfall-runoff, sediment transport, and contaminant transport modeling framework. It is a spatially distributed watershed model which allows for multiple use patterns of antimicrobial copper to be simulated simultaneously across a watershed, thereby providing a cumulative aqueous exposure profile from antimicrobial uses of copper at any point in the watershed.

The purpose of the SAP Consultation is to obtain an independent evaluation of the TERRA watershed-scale model and to gain advice on the application of TERRA as a regulatory model, specifically as applied to the antimicrobial copper risk assessment.

C. FIFRA SAP Documents and Meeting Minutes

EPA's background paper, related supporting materials, charge/questions to FIFRA SAP, FIFRA SAP composition (*i.e.,* members and ad hoc members for this meeting), and the meeting agenda will be available by approximately late September. In addition, the Agency may provide additional background documents as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available electronically, at *http://www.regulations.gov* and the FIFRA SAP homepage at *http://www.epa.gov/scipoly/sap.*

FIFRA SAP will prepare meeting minutes summarizing its recommendations to the Agency approximately 90 days after the meeting. The meeting minutes will be posted on the FIFRA SAP Web site or may be obtained from the OPP Regulatory Public Docket at *http://www.regulations.gov.*

List of Subjects

Environmental protection, Pesticides and pests.

Dated: July 19, 2011.

Frank Sanders,

Director, Office of Science Coordination and Policy.

[FR Doc. 2011–19527 Filed 8–2–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9447–5]

Modification of the Expiration Date for the National Pollutant Discharge Elimination System General Permit for Stormwater Discharges From Construction Activities on Tribal Lands Within the Southeastern United States

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Notice.

SUMMARY: EPA Region 4 is modifying the expiration date of the National Pollutant Discharge Elimination System (NPDES) general permit authorizing the discharge of stormwater from construction activities on Tribal Lands within the states of Alabama, Florida, Mississippi and North Carolina. This modification will extend the NPDES construction general permit (CGP), hereinafter referred to as ''the Region 4 CGP,'' so that it expires on September 1, 2012 instead of August 31, 2011. The purpose of extending the expiration date is to ensure that there is no lapse in permit coverage prior to the effective date of the issuance of a new permit, hereinafter referred to as ''the new National CGP,'' which was proposed as draft for public review and comment on April 25, 2011. The Region 4 CGP was issued on September 1, 2009, and the modification of the expiration date makes it a three-year permit. By Federal law, no NPDES permit may be issued for a period that exceeds five years. The extension complies with this restriction.

DATES: EPA is finalizing a modification to the Region 4 CGP that extends the permit until September 1, 2012 instead of August 31, 2011. The Region 4 CGP will now expire at midnight, on September 1, 2012, or on the effective date of the new National CGP, whichever is earlier.

FOR FURTHER INFORMATION CONTACT: Alanna Conley or Michael Mitchell of the Stormwater and Nonpoint Source Section, Water Protection Division, Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, GA 30303; *telephone number:* (404) 562–9443 or (404) 562–9303; *fax number:* (404) 562–8692; *e-mail address: conley.alanna@epa.gov* or *mitchell.michael@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

If a discharger chooses to apply for coverage under the Region 4 CGP, the permit provides specific requirements for preventing contamination of waterbodies from stormwater discharges from the following construction activities:

Category	Examples of affected entities	North American Industry Classification System (NAICS) Code
Industry	Construction site operators disturbing 1 or more acres of land, or less than 1 acre but part of a larger common plan of development or sale if the larger common plan will ultimately disturb 1 acre or more, and performing the following activities:	
	Building, Developing and General Contracting	236
	Heavy Construction	237

EPA does not intend the preceding table to be exhaustive, but provides it as a guide for readers regarding entities likely to be regulated by this action. This table lists the types of activities that EPA is now aware of that could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the definition of ''construction activity'' and ''small construction activity'' in existing EPA regulations at 40 CFR 122.26(b)(14)(x) and 122.26(b)(15), respectively. If you have questions regarding the applicability of this action to a particular entity, consult the person listed for technical information in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Eligibility for coverage under the Region 4 CGP would be limited to operators of ''new projects'' or ''unpermitted ongoing projects.'' A ''new project'' is one that commences after the effective date of the Region 4 CGP. An ''unpermitted ongoing project'' is one that commenced prior to the effective date of the Region 4 CGP, yet never received authorization to discharge under the previous CGP or any other NPDES permit covering its construction-related stormwater discharges. The Region 4 CGP is effective only in those areas where EPA Region 4 is the permitting authority, which includes all Indian Country Lands within the states of Alabama, Florida, Mississippi, and North Carolina. A list of eligible areas is included in Appendix B of the Region 4 CGP.

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

You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr/*. Electronic versions of the Region 4 CGP and fact sheet are available at EPA Region 4's stormwater Web site at: *http://www.epa.gov/region4/water/permits/stormwater.html.*

II. Background of Permit

A. Statutory and Regulatory History

Section 402(p) of the Clean Water Act (CWA) directs EPA to develop a phased approach to regulate stormwater discharges under the NPDES program. 33 U.S.C. 1342(p). EPA published two regulations, on November 16, 1990 (the ''Phase I rule'', see 55 FR 47990) and on December 8, 1999 (the ''Phase II rule'', see 64 FR 68722), which resulted in requiring NPDES permits for discharges from construction sites disturbing at least one acre but less than five acres, including sites that are less than one acre but are part of a larger common plan of development or sale that will ultimately disturb at least one acre but less than five acres. See 40 CFR 122.26(b)(14)(x) and 122.26(b)(15)(i).

B. The Relevance of EPA's ''C&D Rule'' to the Region 4 CGP

NPDES permits issued for construction stormwater discharges are required under Section 402(a)(1) of the CWA to include conditions for meeting technology-based effluent limits established under Section 301 and, where applicable, Section 306 of the CWA. Once an effluent limitations guideline or new source performance standard is promulgated in accordance with these sections, NPDES permits issued by the NPDES permitting authorities must incorporate requirements based on such limitations and standards. See 40 CFR 122.44(a)(1). Prior to the promulgation of national effluent limitations guidelines or new source performance standards, permitting authorities incorporate technology-based effluent limitations on a best professional judgment basis. CWA section 402(a)(1)(B); 40 CFR 125.3(a)(2)(ii)(B).

On December 1, 2009, EPA published final regulations establishing technology-based Effluent Limitations Guidelines (ELGs) and New Source Performance Standards (NSPS) for the Construction & Development (C&D) point source category. See 40 CFR Part 450, and 74 FR 62996 (December 1, 2009). The Construction & Development Rule, or ''C&D rule'', became effective on February 1, 2010; therefore, all NPDES construction permits issued by EPA or states after this date must incorporate the C&D rule requirements.

Because EPA issued the Region 4 CGP prior to the effective date of the C&D rule, the Agency is not required by the CWA and 40 CFR 122.44(a)(1) to incorporate the C&D rule requirements into the current permit. However, EPA is required to incorporate the C&D rule requirements into the new National CGP. EPA published for public comment on April 25, 2011 a draft of the new National CGP, which includes new requirements implementing the C&D rule. For more information, see 76 FR 22882.

C. Stay of the C&D Rule Numeric Limit

The C&D rule included non-numeric requirements for erosion and sediment control, stabilization, and pollution prevention (see 40 CFR 450.21(a) thru (f)), and for the first time, a numeric limitation on the discharge of turbidity from active construction sites (see 40 CFR 450.22). Since its promulgation, EPA discovered that the data used to calculate the numeric limit for turbidity were misinterpreted, and that it was necessary to recalculate the numeric limit.

On August 12, 2010, EPA filed a motion with the U.S. Court of Appeals for the Seventh Circuit, requesting that the Court issue an order vacating and remanding to the Agency limited portions of the final C&D rule. On August 24, 2010, the U.S. Court of Appeals for the Seventh Circuit remanded the matter to EPA but did not vacate the numeric limit. On September 9, 2010, the National Association of Home Builders (NAHB) filed a motion for clarification (which EPA did not oppose) asking the court to (1) Vacate the limit and (2) hold the case in abeyance until February 15, 2012 instead of remanding the matter to EPA. On September 20, 2010, the court granted the motion in part by ruling to hold the matter in abeyance pending EPA consideration of the numeric limit and the other remand issues, but the court did not vacate the numeric limit. Instead, the court stated that ''EPA may

make any changes to the limit it deems appropriate, as authorized by law.''

EPA issued a direct final rule staying the current numeric limit and a companion proposed rule proposing a stay, and the stay took effect on January 4, 2011, resulting in an indefinite postponement of the implementation of the 280 NTU limit. The Agency is currently developing a proposed rule proposing the recalculated limit. If the numeric limit becomes effective prior to the issuance of the new National CGP, EPA must by law incorporate the applicable numeric limit into the new National CGP.

D. Summary of the Region 4 CGP Issued in 2009

EPA announced the issuance of the 2009 Region 4 CGP on August 26, 2009. See 74 FR 43120. Construction operators choosing to be covered by the Region 4 CGP must certify in their notice of intent (NOI) that they meet the requisite eligibility requirements, described in Subpart 1.3 of the permit. If eligible, operators are authorized to discharge under this permit in accordance with Part 2. Permittees must install and implement control measures to meet the effluent limits applicable to all dischargers in Part 3, and must inspect such stormwater controls and repair or modify them in accordance with Part 4. The permit in Part 5 requires all construction operators to prepare a stormwater pollution prevention plan that identifies all sources of pollution and describes control measures used to minimize pollutants discharged from the construction site. Part 6 details the requirements for terminating coverage under the permit.

EPA Region 4 issued the Region 4 CGP in 2009 to replace the expired CGP, issued in 2004, for operators of new and unpermitted ongoing construction projects. The geographic coverage and scope of eligible construction activities are listed in Appendix B of the Region 4 CGP.

III. Extension of Region 4 CGP Expiration Date

A. What is EPA's rationale for the modification of the region 4 CGP for an extension of the expiration date?

As stated above, EPA is modifying the Region 4 CGP by extending the expiration date of the permit to September 1, 2012. This extension is necessary in order to provide sufficient time for finalization of the new National CGP which will be issued by EPA Region 4 and the other EPA regional offices and would also provide coverage to eligible existing and new construction projects in all areas of the country where EPA is the NPDES permitting authority (*i.e.,* other Indian Lands, Idaho, Massachusetts, New Hampshire, New Mexico, Puerto Rico, Washington, DC, and U.S. territories and protectorates). The new National CGP will incorporate for the first time new effluent limitation guidelines and new source performance standards, which EPA promulgated in December 2009. Once the new National CGP is effective, eligible existing and new construction projects on Tribal lands within Region 4, will be regulated under the new National CGP. The extension of the expiration date of the Region 4 CGP is necessary in order to make up for a delay of several months in the issuance process of the new National CGP caused by the initial uncertainty surrounding the error in calculating the 280 NTU limit and the appropriate way for EPA to address it. This delay made it a near certainty that, given even the most optimistic timeframe for finalizing the new National CGP, EPA would not have been able to finalize the new CGP by the August 31, 2011 expiration date of the 2009 Region 4 CGP. EPA believes that the proposed extension of the expiration date of the Region 4 CGP to September 1, 2012, will provide the sufficient time for the Agency to finalize the new National CGP.

EPA believes it is imperative that EPA has sufficient time to incorporate the C&D rule requirements into the new National CGP prior to the existing permit's expiration date. If EPA does not issue the new National CGP before the expiration date of the Region 4 CGP, no new construction projects could receive general permit coverage between August 31, 2011, and the effective date of the new National CGP, leaving individual NPDES permits as the only available option for permitting new projects. The sole reliance on individual permits would mean that discharge authorizations would almost certainly be delayed due to the greater amount of time and Agency resources that are required for developing and issuing individual permits. In turn, construction projects that need to begin construction activities on or after midnight August 31, 2011, for the Region 4 CGP, would be delayed for an uncertain amount of time until EPA can review their individual permit application and issue the necessary permits. Rather than risk detrimental delays to new construction projects, EPA Region 4 has decided that it is advisable to instead extend the expiration date until September 1, 2012.

B. EPA's Authority To Modify NPDES Permits

EPA regulations establish when the permitting authority may make modifications to existing NPDES permits. In relevant part, EPA regulations state that ''[w]hen the Director receives any information * * * he or she may determine whether or not one or more of the causes listed in paragraph (a) * * * of this section for modification * * * exist. If cause exists, the Director may modify * * * the permit accordingly, subject to the limitations of 40 CFR 124.5(c).'' 40 CFR 122.62. For purposes of this **Federal Register** notice, the relevant cause for modification is at 40 CFR 122.62(a)(2), which states that a permit may be modified when ''[t]he Director has received new information'' and that information ''was not available at the time of permit issuance * * * and would have justified the application of different permit conditions at the time of issuance.'' Pursuant to EPA regulations, ''[w]hen a permit is modified, only the conditions subject to the modification are reopened.'' 40 CFR 122.62.

In the case of the Region 4 CGP, a permit modification is justified based on the new information EPA received following the issuance of the permit, and more specifically, in terms of the delay to the permit process associated with the discovery of the error in the numeric turbidity limit and the Agency's decision to stay the numeric turbidity limit. If this information was available at the time of issuance of the Region 4 CGP, it would have justified EPA establishing an expiration date for the Region 4 CGP that was later than August 31, 2011. As a result, cause exists under EPA regulations to justify modification of the Region 4 CGP to extend the permit until midnight, on September 1, 2012, or on the effective date of the proposed new National CGP, whichever is earlier.

EPA notes that, by law, NPDES permits cannot be extended beyond 5 years. 40 CFR 122.46. The extension of the expiration date of the Region 4 CGP complies with this restriction. The Region 4 CGP was issued with an effective date of September 1, 2009. With the new expiration date of September 1, 2012, the Region 4 CGP will still have been in effect for less than the 5-year limit.

C. Response to Comments

EPA did not receive comment on the proposed extension of the Region 4 CGP expiration date.

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Signed this 25th day of July 2011.

James D. Giattina,

Director, Water Protection Division, U.S. Environmental Protection Agency, Region 4.

[FR Doc. 2011–19687 Filed 8–2–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9447–9]

New York State Prohibition of Discharges of Vessel Sewage; Receipt of Petition and Tentative Affirmative Determination

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; Receipt of Petition and Tentative Affirmative Determination.

SUMMARY: Notice is hereby given that, pursuant to Clean Water Act, Section 312(f)(3) (33 U.S.C. 1322(f)(3)), the State of New York has determined that the protection and enhancement of the quality of the Jamaica Bay in the New York City metropolitan area requires greater environmental protection, and has petitioned the United States Environmental Protection Agency, Region 2, for a determination that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for those waters, so that the State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters.

The New York State Department of Conservation (NYSDEC) on behalf of the New York City Department of Environmental Protection (NYCDEP) has proposed to establish a Vessel Waste No-Discharge Zone (NDZ) for the Jamaica Bay that covers an area of approximately 20,000 acres (17,177 acres of open water and 2,695 acres of upland islands and salt marshes). It is bounded on the west and northwest by Brooklyn, on the north and northeast by Queens. The northeastern and southeastern corners of the Bay are bordered by Nassau County. The northern shore of the Rockaway Peninsula, a part of Queens, forms the southern boundary. The Bay is connected to the Atlantic Ocean through the Rockaway Inlet and has a tidal range of approximately 5 to 6 feet. It measures approximately 10 miles at its widest point east to west and approximately 4 miles at its widest point north to south. The mean depth of the Bay is approximately 13 feet with maximum depths reaching 30 to 50 feet in navigation channels and borrows pit areas. Eight tributaries empty into Jamaica Bay—Sheepshead Bay, Paerdegat Basin, Fresh Creek, Hendrix Creek, Spring Creek, Shellbank Basin, Bergen Basin, and Thurston Basin.

DATES: Comments regarding this tentative determination are due by September 2, 2011.

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

- *E-mail: chang.moses@epa.gov.* Include ''Comments on Tentative Affirmative Decision for NYC JAMAICA BAY NDZ'' in the subject line of the message.
- *Fax:* 212–637–3891.
- *Mail and Hand Delivery/Courier:* Moses Chang, U.S. EPA Region 2, 290 Broadway, 24th Floor, New York, NY 10007–1866. Deliveries are only accepted during the Regional Office's normal hours of operation (8 a.m. to 5 p.m., Monday through Friday, excluding federal holidays), and special arrangements should be made for deliveries of boxed information.

FOR FURTHER INFORMATION CONTACT: Moses Chang, (212) 637–3867, *e-mail address: chang.moses@epa.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that the State of New York (NYS or State) has petitioned the United States Environmental Protection Agency, Region 2, (EPA) pursuant to section 312(f)(3) of Public Law 92–500 as amended by Public Law 95–217 and Public Law 100–4, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the open waters and tributaries of Jamaica Bay, so that the State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters. Adequate pumpout facilities are defined as one pumpout station for 300–600 boats under the Clean Vessel Act: Pumpout Station and Dump Station Technical Guidelines (**Federal Register**, Vol. 59, No. 47, March 10, 1994).

Jamaica Bay is the largest estuarine water body in the New York City metropolitan area and one of the largest coastal wetland ecosystems in New York State. The open waters and tributaries within Jamaica Bay provide important natural and recreational resources for boating and recreational activities that contribute significantly to the local and regional economy. In 2005, the Jamaica Bay Watershed Protection Plan (JBWPP) was put into motion by the City Council of New York City under Local Law 71 (LL 71). The objective of LL 71 is to ensure a holistic watershed approach toward restoring and maintaining the water quality and ecological integrity of the Bay. The JBWPP recommends management actions for protecting and improving the health of the Bay, *e.g,* adoption of appropriate regulations to mitigate the impacts of boat vessel waste discharges.

Jamaica Bay is a component of the National Park Service's (NPS) Gateway National Recreation Area (GNRA). A significant portion of the Bay, approximately 9,100 acres, has also been designated by the NPS as the Jamaica Bay Wildlife Refuge and is designated by the New York State Department of State (NYSDOS) as a Significant Coastal Fish and Wildlife Habitat. The diversity of bird species and breeding habitats within the Bay were important factors in these designations. The Jamaica Bay Wildlife Refuge was also the first site to be designated by the National Audubon Society as an ''Important Bird Area.'' It is clear that Jamaica Bay is currently functioning as a regional habitat for many different species of wildlife. In combination with other water quality improvement initiatives, the NDZ designation will further enhance the recreational and ecological benefits of Jamaica Bay, potentially attracting more visitors to the Bay.

In order for EPA to determine that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the New York State areas of the Jamaica Bay, the State must demonstrate that the pumpout-to-vessel ratio does not exceed 1:600.

In its petition, the State described the recreational vessels that use the Bay, and the pumpout facilities that are available for their use. Based on a review of NYS Department of Motor Vehicle boat registrations, site visits to marinas and reviewing high resolution orthoimagery of Jamaica Bay, NYCDEP has determined that there are approximately 1,200 to 1,500 boats that utilize the Bay throughout the boating season. This number may include a significant number of transient vessels and not only boats that are permanently moored in Jamaica Bay.

Jamaica Bay is primarily used for recreational boating with very little commercial traffic. The few commercial vessels that do enter the bay are primarily sightseeing and fishing vessels which, pursuant to New York City regulations, must use private boat pumpout services to unload sewage within the Bay. Therefore, the boat pumpouts provided by NYCDEP within Jamaica Bay are utilized for recreational vessels only.

There are four vessel pumpout facilities available in the Jamaica Bay. Three of those are land-based pumpout facilities operated by NYCDEP, and the fourth is a 24-foot sewage pumpout vessel operated by New York/New Jersey Baykeeper, that serves vessels docked or anchored throughout the Bay. All four facilities provide the pumpout services free of charge. Given that approximately 1,500 recreational vessels use the Bay, the pumpout-to-vessel ratio for those vessels is 1:375 (*i.e.,* 4 facilities for 1,500 boats). Therefore, the pumpout facilities in Jamaica Bay satisfy the Clean Vessel Act criterion of 1 pumpout per 300–600 vessels.

A list of the facilities, phone numbers, locations, hours of operation, water depth and fee is provided as follows:

LIST OF PUMPOUTS IN THE JAMAICA BAY NDZ PROPOSED AREA AVAILABLE FOR RECREATIONAL VESSELS

Number	Name	Location	Contact information	Dates/days/hours of operation	Water depth (feet)	Cost
1	Hudson River Yacht Club.	Paerdegat Basin	718–251–9791; Channel 71.	May 1–Oct 31; daily, 10 AM–5 PM.	10–14	Free.
2	Coney Island WWTP	Shellbank Creek	718–743–0990; Channel 13.	May 1–Oct 31 15; 24 hrs a day.	8–10	Free.
3	Rockaway WWTP	Jamaica Bay	718–474–3663; Channel 68.	May 1–Oct 31 15; 24 hrs a day.	10–14	Free.
4	NY/NJ Baykeeper's 24 foot sewage-pumpout vessel.	Jamaica Bay	732–337–9262; Channel 9.	Memorial Day to Labor Day; Sunrise to sunset.	N/A	Free.

Based on the above, EPA hereby proposes to make an affirmative determination that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are available for the open waters and tributaries of the Jamaica Bay of the New York City metropolitan area.

A 30-day period for public comment has been established on this matter, and EPA invites any comments relevant to its proposed determination.

Dated: July 21, 2011.

Judith A. Enck,

Regional Administrator, Region 2.

[FR Doc. 2011–19681 Filed 8–2–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9447–8]

Notice of Utah Adoption by Reference of the Pesticide Container Containment Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice is provided to formally acknowledge the State of Utah's adoption by reference of the federal Pesticide Container Containment (PCC) Rule regulations. In accordance with State of Utah Agricultural Code, the Utah Department of Agriculture and Food adopted the applicable portions of 40 CFR part 152, subpart A, § 152.3, and Part 165, subparts A through E. The State did not request any modification to the federal PCC rules, and with this notice, the EPA Region 8, is formally announcing the adoption by reference with no modifications.

FOR FURTHER INFORMATION CONTACT: VelRey Lozano, EPA Region 8, *telephone number:* (303) 312–6128; *e-mail address: lozano.velrey@epa.gov* or Clark Burgess, Utah Department of Agriculture and Food (UDAF), *telephone number:* (801) 538–7188; *e-mail address: cburgess@utah.gov.*

Authority: 7 U.S.C. 136 et seq. (1996).

Dated: July 21, 2011.

James B. Martin,

Regional Administrator, Region 8.

[FR Doc. 2011–19697 Filed 8–2–11; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Notice of Submission for OMB Review; Comment Request

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of Information Collection—Uniform Guidelines on Employee Selection Procedures—Extension Without Change.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Equal Employment Opportunity Commission gives notice of its intent to submit to the Office of Management and Budget (OMB) a request for renewal of the information collection described below.

DATES: Written comments on this notice must be submitted on or before October 3, 2011.

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

- By mail to Stephen Llewellyn, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street, NE., Washington, DC 20507.
- By facsimile (''FAX'') machine to (202) 663–4114. (There is no toll free FAX number.) Only comments of six or fewer pages will be accepted via FAX transmittal, in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTD). (These are not toll free numbers).
- By the Federal eRulemaking Portal: *http://www.regulations.gov.* After accessing this Web site, follow its instructions for submitting comments.

Comments need be submitted in only one of the above-listed formats, not all three. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information you provide. Copies of the received comments also will be available for inspection in the EEOC Library, FOIA Reading Room, by advance appointment only, from 9 a.m. to 5 p.m., Monday through Friday, except legal holidays, from October 3, 2011. Persons who schedule an appointment in the EEOC Library, FOIA Reading Room, and need assistance to view the comments will be provided with appropriate aids upon request, such as readers or print magnifiers. To schedule an appointment to inspect the comments at the EEOC Library, FOIA Reading Room, contact the EEOC Library by calling (202) 663–4630 (voice) or (202) 663–4641 (TTY). (These are not toll free numbers).

FOR FURTHER INFORMATION CONTACT: Kathleen Oram, Senior Attorney, at (202) 663–4681 (voice), or Thomas J. Schlageter, Assistant Legal Counsel, (202) 663–4668 (voice) or (202) 663–7026 (TDD).

SUPPLEMENTARY INFORMATION:

Introduction

The Equal Employment Opportunity Commission (EEOC or Commission) gives notice of its intent to submit the recordkeeping requirements contained in the Uniform Guidelines on Employee Selection Procedures (UGESP or Uniform Guidelines) [1] to the Office of Management and Budget (OMB) for a three-year extension without change under the Paperwork Reduction Act of 1995 (PRA).

Request for Comments

Pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, and OMB regulation 5 CFR 1320.8(d)(1), the EEOC invites public comments that will enable the agency to:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collectEion of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Collection

Collection Title: Recordkeeping Requirements of the Uniform Guidelines on Employee Selection Procedures, 29 CFR part 1607, 41 CFR part 60–3, 28 CFR part 50, 5 CFR part 300.

OMB Number: 3046–0017.

Type of Respondent: Businesses or other institutions; Federal Government; State or local governments and farms.

North American Industry Classification System (NAICS) Code: Multiple.

Standard Industrial Classification Code (SIC): Multiple.

Description of Affected Public: Any employer, Government contractor, labor organization, or employment agency covered by the Federal equal employment opportunity laws.

Respondents: 899,580.

Responses: 899,580.

Recordkeeping Hours: 10,783,687 per year.

Number of Forms: None.

Form Number: None.

Frequency of Report: None.

Abstract: The Uniform Guidelines provide fundamental guidance for all Title VII-covered employers about the use of employment selection procedures. The records addressed by UGESP are used by respondents to assure that they are complying with Title VII and Executive Order 11246; by the Federal agencies that enforce Title VII and Executive Order 11246 to investigate, conciliate, and litigate charges of employment discrimination; and by complainants to establish violations of Federal equal employment opportunity laws. While there is no data available to quantify these benefits, the collection of accurate applicant flow data enhances each employer's ability to address any deficiencies in recruitment and selection processes, including detecting barriers to equal employment opportunity.

Burden Statement: There are no reporting requirements associated with UGESP. The burden being estimated is the cost of collecting and storing a job applicant's gender, race, and ethnicity data. The only paperwork burden derives from this recordkeeping.

Only employers covered under Title VII and Executive Order 11246 are subject to UGESP. For the purpose of burden calculation, employers with 15 or more employees are counted. The number of such employers is estimated at 899,580, which combines estimates from private employment,[2] the public sector,[3] colleges and universities,[4] and referral unions.[5]

This burden assessment is based on an estimate of the number of job applications submitted to all Title VII-covered employers in one year, including paper-based and electronic applications. The total number of job applications submitted every year to covered employers is estimated to be 1,294,042,500, which is based on a National Organizations Survey [6] average of approximately 35 applications for every hire and a Bureau of Labor Statistics data estimate of 36,731,900 annual hires.[7] It includes 161,300 applicants for union membership reported on the EEO–3 form for 2008.

The employer burden associated with collecting and storing applicant demographic data is based on the following assumptions: Applicants would need to be asked to provide three pieces of information—sex, race/ethnicity, and an identification number (a total of approximately 13 keystrokes); the employer would need to transfer information received to a database either manually or electronically; and the employer would need to store the 13 characters of information for each applicant. Recordkeeping costs and burden are assumed to be the cost of entering 13 keystrokes.

Assuming that the required recordkeeping takes 30 seconds per record, and assuming a total of 1,294,042,500 paper and electronic applications per year (as calculated above), the resulting UGESP burden hours would be 10,783,687. Based on a wage rate of $13.65 per hour for the individuals entering the data, the collection and storage of applicant demographic data would come to approximately $147,197,332 per year for Title VII-covered employers. We expect that the foregoing assumptions are over-inclusive, because many employers have electronic job application processes that should be able to capture applicant flow data automatically.

While the burden hours and costs for the UGESP recordkeeping requirement seem very large, the average burden per employer is quite small. We estimate that UGESP applies to 899,580 employers, approximately 822,000 of which are small firms (entities with 15–500 employees) according to data provided by the Small Business Administration Office of Advocacy.[8] If we assume that a firm with 250

[1] 29 CFR part 1607, 41 CFR part 60–3, 28 CFR part 50, 5 CFR part 300.

[2] ''Employer Firms, Establishments, Employment, Annual Payroll and Receipts for Small Firm Size Classes, 2007 (*http://www.sba.gov/advo/research/data.html#us*).

[3] ''Government Employment & Payroll'' (statistics on number of federal, state, and local government civilian employees and their gross payrolls for March 2008); ''2008 State & Local Government'' (data for 50 state governments and all local governments); Individual Government Data File (*http://www.census.gov/govs/apes/indes.html-2010*). The number of government entities was adjusted to only include those with 15 or more employees.

[4] Postsecondary Institutions in the United States: Fall 2007; Degrees and Other Awards Conferred: 2006–07; and 12-Month Enrollment: 2006–07, (*http://nces.ed.gov/pubsearch/pubsinfo.spp?pubid=2008159rev*).

[5] EEO–3 Reports filed by referral unions in 2008 with EEOC.

[6] The National Organizations Survey is a survey of business organizations across the United States in which the unit of analysis is the actual workplace, (*http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/04074*).

[7] Bureau of Labor Statistics Job Openings and Labor Turnover Survey—2010—(*http://www.bls.gov/jlt/data.htm*) adjusted to only include hires by firms with 15 or more employees.

[8] *See* Firm Size Data at *http://sba.gov/advo/research/data.html#us.*

employees (in the mid-range of the 822,000 small employers) has 20 job openings per year and receives an average of 35 applications per job opening, the burden hours to collect and store applicants' sex and race/ethnicity data would be 5.8 hours per year, and the costs would be $79.11 per year. Similarly, if we assume that an employer with 1,500 employees has 125 job openings to fill each year, and receives 35 applications per opening, the burden hours would be 36.5 hours per year and the annual costs would be $498.23.

Dated: July 28, 2011.

Jacqueline A. Berrien,

Chair, Equal Employment Opportunity Commission.

[FR Doc. 2011–19642 Filed 8–2–11; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

SUMMARY:

Background

Notice is hereby given of the final approval of proposed information collections by the Board of Governors of the Federal Reserve System (Board) under OMB delegated authority, as per 5 CFR 1320.16 (OMB Regulations on Controlling Paperwork Burdens on the Public). Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

FOR FURTHER INFORMATION CONTACT: Acting Federal Reserve Board Clearance Officer—Cynthia Ayouch—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202–452–3829). Telecommunications Device for the Deaf (TDD) users may contact (202–263–4869), Board of Governors of the Federal Reserve System, Washington, DC 20551.

OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

Final approval under OMB delegated authority of the extension for three years, without revision, of the following reports:

Report title: Notifications Related to Community Development and Public Welfare Investments of State Member Banks.

Agency form number: FR H–6.

OMB control number: 7100–0278.

Frequency: Event-generated.

Reporters: State member banks.

Estimated annual reporting hours: 11 hours.

Estimated average hours per response: Post Notification, 2 hours; Application (Prior Approval) 2 hours; and Extension of divestiture period, 5 hours.

Number of respondents: Post Notification, 2; Application (Prior Approval), 1; and Extension of divestiture period, 1.

General description of report: This information collection is required to obtain a benefit (12 U.S.C. 338a, and 12 CFR 208.22). Individual respondent data generally are not regarded as confidential, but information that is proprietary or concerns examination ratings would be considered confidential pursuant to Freedom of Information Act (FOIA) Exemption 8. In addition, if the respondent can establish the potential for substantial competitive harm, such information would be protected from disclosure pursuant to FOIA Exemption 4. The confidentiality status would be determined on a case-by-case basis.

Abstract: Regulation H requires state member banks that want to make community development or public welfare investments to comply with the Regulation H notification requirements: (1) If the investment does not require prior Board approval, a written notice must be sent to the appropriate Federal Reserve Bank; (2) if certain criteria are not met, a request for approval must be sent to the appropriate Federal Reserve Bank; and, (3) if the Board orders divestiture but the bank cannot divest within the established time limit, a request or requests for extension of the divestiture period must be submitted to the appropriate Federal Reserve Bank.

Current Actions: On May 10, 2011, the Federal Reserve published a notice in the **Federal Register** (76 FR 27054) requesting public comment for 60 days on the extension, without revision, of the FR H–6. The comment period for this notice expired on July 11, 2011. The Federal Reserve did not receive any comments.

2. *Report title:* Application for Membership in the Federal Reserve System.

Agency form number: FR 2083, 2083A, 2083B, and 2083C.

OMB control number: 7100–0046.

Frequency: On occasion.

Reporters: Newly organized banks that seek to become state member banks, or existing banks or savings institutions that seek to convert to state member bank status.

Estimated annual reporting hours: 168 hours.

Estimated average hours per response: 4 hours.

Number of respondents: 42

General description of report: This information collection is authorized by Section 9 of the Federal Reserve Act (12 U.S.C. 321, 322, and 333) and is required to obtain or retain a benefit. Most individual respondent data are not considered confidential. Applicants may, however, request that parts of their membership applications be kept confidential, but in such cases the Applicant must justify its request by demonstrating how an exemption under the Freedom of Information Act (FOIA) is satisfied. The confidentiality status of the information submitted will be judged on a case-by-case basis

Abstract: The application for membership is a required one-time submission that collects the information necessary for the Federal Reserve to evaluate the statutory criteria for admission of a new or existing state bank into membership in the Federal Reserve System. The application collects managerial, financial, and structural data.

Current Actions: On May 10, 2011, the Federal Reserve published a notice in the **Federal Register** (76 FR 27054) requesting public comment for 60 days on the extension, without revision, of the FR 2083, 2083A, 2083B and FR 2083C. The comment period for this notice expired on July 11, 2011. The Federal Reserve did not receive any comments.

3. *Report title:* Applications for Subscription to, Adjustment in the Holding of, and Cancellation of Federal Reserve Bank Stock.

Agency form number: FR 2030, FR 2030a, FR 2056, FR 2086, FR 2086a, FR 2087.

OMB control number: 7100–0042.

Frequency: On occasion.

Reporters: National, state member, and nonmember banks.

Estimated annual reporting hours: FR 2030: 10 hours; FR 2030a: 16 hours; FR

2056: 517 hours; FR 2086: 1 hour; FR 2086a: 11 hours FR 2087: 1 hour.

Estimated average hours per response: .5 hours.

Number of respondents: FR 2030: 20; FR 2030a: 31; FR 2056: 1,034; FR 2086: 1; FR 2086a: 22; FR 2087: 2.

General description of report: These information collections are mandatory.

- FR 2030 and FR 2030a: (12 U.S.C. 222, 282, 248(a) and 321).
- FR 2056: (12 U.S.C. 287, 248(a) and (i)).
- FR 2086: (12 U.S.C. 287, 248(a) and (i)).
- FR 2086a: (12 U.S.C. 321, 287, 248(a)).
- FR 2087: (12 U.S.C. 288, 248(a) and (i)).

Most individual respondent data are not considered confidential. Applicants may request that parts of their membership applications be kept confidential. Any request for confidentiality must be accompanied by a detailed justification for confidentiality. The confidentiality status of the information submitted will be judged on a case-by-case basis.

Abstract: These application forms are required by the Federal Reserve Act and Regulation I. These forms must be used by a new or existing member bank (including a national bank) to request the issuance, and adjustment in, or cancellation of Federal Reserve Bank stock. The forms must contain certain certifications by the applicants, as well as certain other financial and shareholder data that is needed by the Federal Reserve to process the request.

Current Actions: On May 10, 2011, the Federal Reserve published a notice in the **Federal Register** (76 FR 27054) requesting public comment for 60 days on the extension, without revision, of the FR 2030, FR 2030a, FR 2056, FR 2086, FR 2086a, and FR 2087. The comment period for this notice expired on July 11, 2011. The Federal Reserve did not receive any comments.

Board of Governors of the Federal Reserve System, July 28, 2011.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2011–19562 Filed 8–2–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or To Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 18, 2011.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Vice President) 33 Liberty Street, New York, New York 10045–0001:

1. Westpac Banking Corporation, Sydney, Australia; to indirectly acquire 100 percent of the voting shares of JOHCM (USA) General Partner Inc., Wilmington, Delaware, and serve as general partner to certain limited partnerships, see *UBS AG*, 84 Federal Reserve Bulletin 684 (1998), and thereby engage in financial advisory and private placement services, pursuant to sections 225.28(b)(6) and (b)(7)(iii) of Regulation Y.

Board of Governors of the Federal Reserve System, July 29, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–19606 Filed 8–2–11; 8:45 am]

BILLING CODE 6210–01–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0200; Docket 2011–0001; Sequence 1]

General Services Administration Acquisition Regulation; Submission for OMB Review; Sealed Bidding

AGENCY: Office of the Chief Acquisition Officer, GSA.

ACTION: Notice of request for comments regarding a renewal to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the Regulatory Secretariat (MVCB) will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding sealed bidding.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: September 2, 2011.

FOR FURTHER INFORMATION CONTACT: Michael O. Jackson, Procurement Analyst, Contract Policy Branch, at telephone (202) 208–4949 or *michaelo.jackson@gsa.gov.*

ADDRESSES: Submit comments identified by Information Collection 3090–0200, Sealed Bidding, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by inputting ''Information Collection 3090–0200, Sealed Bidding'' under the heading ''Enter Keyword or ID'' and selecting ''Search''. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 3090–0200, Sealed Bidding''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 3090–0200, Sealed Bidding'' on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417. *Attn:* Hada Flowers/IC 3090–0200, Sealed Bidding.

Instructions: Please submit comments only and cite Information Collection 3090–0200, Sealed Bidding, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

SUPPLEMENTARY INFORMATION:

A. Purpose

The General Services Administration is requesting that the Office of Management and Budget (OMB) review

and approve information collection 3090–0200, Sealed Bidding. The information requested regarding an offeror's monthly production capability is needed to make progressive awards to ensure coverage of stock items.

B. Annual Reporting Burden

Respondents: 10.
Responses per Respondent: 1.
Hours per Response: .5.
Total Burden Hours: 5.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 3090–0200, Sealed Bidding, in all correspondence.

Dated: July 28, 2011.

Millisa Gary,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 2011–19699 Filed 8–2–11; 8:45 am]

BILLING CODE 6820–61–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project: ''Evaluation of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) Quality Demonstration Grant Program.'' In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3521, AHRQ invites the public to comment on this proposed information collection.

DATES: Comments on this notice must be received by October 3, 2011.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by e-mail at *doris.lefkowitz@AHRQ.hhs.gov.*

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by e-mail at *doris.lefkowitz@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

Evaluation of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) Quality Demonstration Grant Program

Section 401(a) of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), Public Law 111–3, amended the Social Security Act (the Act) to enact section 1139A (42 U.S.C. 1320b–9a). AHRQ is requesting approval from the Office of Management and Budget (OMB) for data collection to support a national evaluation of the quality demonstration grants authorized under section 1139A(d) of the Act. Evaluating whether the CHIPRA demonstration grants improve the quality of care received by children in Medicaid and CHIP aligns with AHRQ's mission of improving the quality and effectiveness of health care in the United States.

CHIPRA included funding for five-year grants so that states can demonstrate effective, replicable strategies for improving the quality of children's health care in Medicaid and CHIP. In February 2010, the U.S. Department of Health and Human Services announced the award of 10 demonstration grants. Six of the grantee states are partnering with other states, for a total of 18 demonstration states. The demonstration states are: Colorado (partnering with New Mexico); Florida (with Illinois); Maine (with Vermont); Maryland (with Wyoming and Georgia); Massachusetts; North Carolina; Oregon (with Alaska and West Virginia); Pennsylvania; South Carolina; and Utah (with Idaho).

These demonstration states are implementing 48 distinct projects in at least one of five possible grant categories, A to E. Category A grantees are experimenting with and/or evaluating the use of new pediatric quality measures. Category B grantees are promoting health information technology (HIT) for improved care delivery and patient outcomes. Category C grantees are expanding person-centered medical homes or other provider-based levels of service delivery. Category D grantees will evaluate the impact of a model pediatric electronic health record. Category E grantees are testing other state-designed approaches to quality improvement in Medicaid and CHIP.

This research has the following goals:

(1) To identify CHIPRA state activities that measurably improve the nation's health care, especially as it pertains to children.

(2) To develop a deep, systematic understanding of how CHIPRA demonstration states carried out their grant-funded projects.

(3) To understand why the CHIPRA demonstration states pursued certain strategies.

(4) To understand whether and how the CHIPRA demonstration states' efforts affected outcomes related to knowledge and behavior change in targeted providers and/or consumers of health care.

This study is being conducted by AHRQ through its contractor, Mathematica Policy Research, and two subcontractors, pursuant to AHRQ's statutory authority to conduct and support research on healthcare and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of healthcare services and with respect to quality measurement and improvement, 42 U.S.C. 299a(a)(1) and (2).

Method of Collection

To achieve the goals of this project the following data collections will be implemented:

(1) Key Staff Interviews—two rounds of semi-structured interviews with key staff directly involved in the design and oversight of grant-funded activities in each of the 18 demonstration states. Key staff includes the project director, project manager, and principal investigator and/or medical director. The purpose of these interviews is to gain insight into the implementation of demonstration projects, to understand contextual factors, and to identify lessons and implications for the broad application and sustainability of projects. Because key staff have the most knowledge of project design and implementation, they will be interviewed annually. This request for OMB approval covers the first two annual interviews with key staff.

(2) Implementation Staff Interviews—semi-structured interviews with staff involved in the day-to-day implementation of grant-funded projects in each of the 18 demonstration states. These staff members include state agency employees, provider trainers or coaches, health IT vendors, and/or project consultants. The purpose of these interviews is to gain insight into the opportunities and challenges related to key technical aspects of project implementation.

(3) Stakeholder Interviews—semi-structured interviews with external stakeholders that have a direct interest in children's care quality in Medicaid and CHIP in each of the 18 demonstration states. Stakeholders include representatives of managed care organizations, state chapters of the American Academy of Pediatrics, advocacy organizations for children and families, and social service agencies. These stakeholders will be familiar with the CHIPRA projects and may serve on advisory panels or workgroups related to one or more projects. The interviews will gather insight into the opportunities and challenges related to project implementation, stakeholder satisfaction with their project involvement, and contextual factors.

(4) Health Care Provider Interviews—semi-structured interviews with health care providers who are, or are not, participating in demonstration grant activities (participating and comparison providers, respectively) in each of the 18 demonstration states. Providers can include clinicians from private practices, public clinics, federally qualified health centers, care management entities, or school based health centers. The interviews with participating providers will capture information about project-related activities, providers' perceptions of the likelihood of achieving intended outcomes, and providers' involvement in other quality-improvement initiatives. The interviews with comparison providers will ask about the provider's experiences providing care to children in Medicaid and CHIP, coordinating with other providers, use of HIT, and provision of patient-centered care.

(5) Non-demonstration States Interviews—semi-structured interviews with knowledgeable Medicaid or CHIP personnel including the Medicaid/CHIP director, the Medicaid health-IT coordinator, and/or project directors for state medical home initiatives in 9 non-demonstration states. The purpose of these interviews is to enrich AHRQ's understanding of how the CHIPRA quality grants contribute to improved care quality above and beyond other quality-related initiatives happening at the same time. Examples of other quality-related initiatives include those funded by the HITECH Act, the Pediatric Quality Measures Program, and various medical home initiatives.

The information collected through the semi-structured interviews will be a key source of evidence for the national evaluation of the demonstration. Collecting high-quality, timely interview data from a wide range of knowledgeable respondents directly serves AHRQ's goal of understanding project implementation and the selection and execution of strategies, and of identifying the particular activities and resources that contributed most to any observed improvement in children's care quality. The products that will result from this project include practice profiles, replication guides, case studies, and peer-reviewed journal articles.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden hours for the respondent's time to participate in this evaluation. Key Staff Interviews will be conducted twice with 4 persons from each of the 18 CHIPRA demonstration States and will last for about 1–2 hours. Implementation Staff Interviews will include 16 persons from each of the 18 CHIPRA demonstration States and take an hour to complete. Stakeholder Interviews will include 8 persons from each of the 18 CHIPRA demonstration States and also take an hour to complete. Health Care Provider Interviews will be conducted with 12 persons from each of the 18 CHIPRA demonstration States and will last 45 minutes. Non-demonstration States Interviews will be conducted with 5 persons from 9 non-demonstration States and will take about 1 hour to complete. The total burden for this evaluation is estimated to be 855 hours.

Exhibit 2 shows the estimated annualized cost burden associated with the respondent's time to participate in this evaluation. The total cost burden is estimated to be $32,914.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Data collection	Number of respondents	Number of states	Number of responses per respondent	Hours per response	Total burden hours
Key Staff Interviews: Implementation	4	18	2	1.5	216
Staff Interviews: Stakeholder	16	18	1	1	288
Interviews: Health Care	8	18	1	1	144
Provider Interviews: Non-demonstration	12	18	1	45/60	162
States Interviews	5	9	1	1	45
Total	45	na	na	na	855

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Data collection	Number of respondents	Number of states	Total burden hours	Average hourly wage *	Total cost burden
Key Staff Interviews: Implementation	4	18	216	$36.35	$7,852
Staff Interviews: Stakeholder	16	18	288	34.67	9,985
Interviews: Health Care Provider	8	18	144	18.68	2,690
Interviews: Non-demonstration	12	18	162	62.50	10,125
States Interviews	5	9	45	50.26	2,262
Total	45	na	855	na	32,914

* Based upon the mean of the average wages, National Compensation Survey: Occupational wages in the United States May 2009, ''U.S. Department of Labor, Bureau of Labor Statistics.'' Key project staff are state government workers who are general managers. Other implementation personnel are state workers who are managers of social and community services. External stakeholders are civilian workers who are in community and social services occupations. Participant providers are civilian pediatric physicians. Medicaid/CHIP personnel are federal employees in a medical and health service management role.

Estimated Annual Costs to the Federal Government

Exhibit 3 shows the total and annualized cost for this evaluation. The total cost to the government of the entire evaluation contract is $8,258,311 (including a base period and four option periods); the annualized cost is $1,651,662 per year (Exhibit 3). These costs will be incurred from 2010 to 2012.

EXHIBIT 3—ESTIMATED TOTAL AND ANNUAL COST

Cost component	Total cost	Annual cost
Administration	$571,422	$114,284
Coordination	38,003	7,601
Stakeholder Feedback	201,637	40,327
Technical Expert Panel	359,276	71,855
Evaluation Design & Implementation	3,981,390	796,278
Technical Assistance Plan	934,440	186,888
Data Collection Instruments	138,997	27,799
OMB Clearance	35,617	17,808
Section 508 Compliance	13,883	2,777
Data and Analysis Reports	735,426	147,085
Interim Evaluation Reports	408,803	81,761
Dissemination	736,149	184,037
Final Report	103,269	103,269
Total	8,258,311	1,651,662

Request for Comments

In accordance with the Paperwork Reduction Act, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ healthcare research and healthcare information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) 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 upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: July 21, 2011.

Carolyn M. Clancy,

Director.

[FR Doc. 2011–19391 Filed 8–2–11; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project: ''Evaluation of the Technical Assistance to ARRA Complex Patient Grantees Project'' In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3521, AHRQ invites the public to comment on this proposed information collection.

DATES: Comments on this notice must be received by October 3, 2011.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by e-mail at *doris.lefkowitz@AHRO.hhs.gov.*

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by e-mail at *doris.lefkowitz@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

Evaluation of the Technical Assistance to ARRA Complex Patient Grantees Project Under the American Recovery and Reinvestment Act (ARRA) of 2009, the Agency for Healthcare Research and Quality (AHRQ) awarded $473 million in grants and contracts to support patient-centered outcomes research. As part of this investment, AHRQ funded fourteen R21 (exploratory) grants and thirteen R24 (infrastructure development) grants to generate new knowledge on individuals with multiple chronic conditions. This work is critical to improve the understanding of how to prioritize evidence-based services for patients with multiple co-morbidities and to suggest appropriate adaptations to guidelines for their care.

In order to support the R21 and R24 complex patient grantees, AHRQ funded a Learning Network and Technical Assistance Center (LN&TAC) to encourage collaboration among the researchers and help them share research methods, definitions and products through in-person meetings, small workgroups and network facilitation. The LN&TAC will provide the grantees with technical assistance regarding research design, data collection, data analysis, public use dataset development, and dissemination.

Through the LN&TAC AHRQ will support work to:

(1) Create and support a Learning Network of the complex patient grantees to facilitate advancement of infrastructure development, as well as

to leverage developments and learning across the program. The Learning Network will give these grantees the opportunity to share information with and learn from other research teams, provide resources for data management and other research-related issues, and synthesize and disseminate findings that transcend individual projects.

(2) Provide both group and individual technical assistance to grantees as they address issues of ARRA reporting, infrastructure development, data sharing, and creation of public use data sets.

(3) Disseminate results, including developing materials targeted to researchers and policy-makers to describe study results and facilitate future use of newly created datasets. This will include a marketing plan to advertise availability of datasets and promote their use.

(4) Develop and implement an evaluation of the above activities throughout the project.

The purpose of this Information Collection Request is to evaluate the effectiveness of the LN&TAC. The goals of the evaluation are to:

(1) Ascertain whether expected outcomes of the LN&TAC were achieved;

(2) Assess whether the LN&TAC met the needs and expectations of the grantees;

(3) Identify challenges and lessons learned, and determine the feasibility and advisability of developing similar project models in the future.

This study is being conducted by AHRQ through its contractor, Abt Associates, pursuant to AHRQ's statutory authority to ''conduct and support research, evaluations, and training, support demonstration projects, research networks and multidisciplinary centers, provide technical assistance, and disseminate information on healthcare and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of healthcare services.'' 42 U.S.C. 299a(a)(1).

Method of Collection

To meet the goals of this evaluation the following data collections will be implemented:

(1) LN Meeting Evaluation—Grantees who attend the three annual in-person Learning Network meetings will be asked to complete the LN Meeting Evaluation to provide immediate feedback about their level of satisfaction with the meeting (including session topics and speakers) and make suggestions about how the meeting could be improved.

(2) Group TA Evaluation—Grantees who participate in group technical assistance activities, such as webinars and the TA given at annual meetings, will be asked to complete the Group TA Evaluation to provide feedback about their level of satisfaction with the group TA (including session leader), how effective the TA was, and make suggestions about how the TA session could have been better.

(3) Individual TA Evaluation—Grantees who request individual technical assistance will be asked to complete the Individual TA Evaluation to provide feedback about their level of satisfaction with the TA (including session leader), how effective the TA was, and make suggestions about how the TA session could have been better.

(4) Annual Survey—All 27 Complex Patient grantees will be asked to complete the Annual Survey once a year. This survey is designed to measure whether, due to their participation in the project, grantees have experienced changes in knowledge, confidence or attitudes related to research activities and grant requirements, changes in their research itself (design, methods, and/or analyses), and/or if participation has increased collaboration (e.g., sharing methods, developing new coding, merging data sets) among the Complex Patient researchers, as well as satisfaction with the LN&TAC in general.

(5) Annual Interview—The Annual Interview will be administered with a small subset of 5 grantees per year, and will be used to augment the Annual Survey with more in-depth qualitative data. Therefore, similar questions will be asked in the Annual Interview as are asked in the Annual Survey, but the interview will allow for probing and clarification of answers. Different grantees will be asked to participate in the interview each year, such that no grantee participates in the Annual Interview more than once during the three year contract.

These evaluation instruments are designed to capture a combination of quantitative and qualitative data No claim is made that the results from this study will be generalizable in the statistical sense. Rather, this evaluation is aimed at determining the effectiveness of this particular program.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden hours for the grantees' time to participate in the surveys and interviews. The LN Meeting Evaluation will be completed by about 22 grantees and takes about 20 minutes to complete. The Group TA Evaluation will be completed by 8 grantees 4 times a year, although not necessarily the same 8 persons each time and will take 5 minutes to complete. The Individual TA Evaluation will be completed by about 15 grantees annually and takes 5 minutes to complete. The Annual Survey will be completed by 22 grantees and will take about 10 minutes to complete. Annual Interviews will be conducted with 5 persons annually and will last 45 minutes. The total annualized burden hours are estimated to be 19 hours.

Exhibit 2 shows the estimated annualized cost burden for the grantees' time to provide the requested data. The estimated total cost burden is about $774.

EXHIBIT 1—ESTIMATED ANNUALIZED

Form name	No. of respondents	No. of responses per respondent	Hours per response	Total burden hours
LN Meeting Evaluation	22	1	20/60	7
Group TA Evaluation	8	4	5/60	3
Individual TA Evaluation	15	1	5/60	1
Annual Survey	22	1	10/60	4
Annual Interview	5	1	45/60	4
Total	72	na	na	19

EXHIBIT 2—ESTIMATED ANNUALIZED

Form name	No. of respondents	Total burden hours	Average hourly wage rate*	Total cost burden
LN Meeting Evaluation	22	7	$40.75	$285
Group TA Evaluation	8	3	40.75	122
Individual TA Evaluation	15	1	40.75	41
Annual Survey	22	4	40.75	163
Annual Interview	5	4	40.75	163
Total	72	19	40.75	774

*Based upon tne mean hourly wage rate for Medical Scientists, Except Epidemiologists, from the National Compensation Survey: Occupational wages in the United States May 2009, ''U.S. Department of Labor, Bureau of Labor Statistics,'' accessed on April 26, 2011.

Estimated Annual Costs to the Federal Government

The total cost of this contract to the government is $178,137 over the three years of the project (September 27, 2010 to September 26, 2013). Therefore, the annualized cost to the government of the evaluation of the Complex Patient LN&TAC is $59,379.

EXHIBIT 3—ESTIMATED TOTAL AND ANNUALIZED COST

Cost component	Total cost	Annualized cost
Project Development	$70,247	$23,416
Data Collection Activities	54,636	18,212
Data Processing and Analysis	31,220	10,406
Overhead	22,034	7,345
Total	178,137	59,379

Request for Comments

In accordance with the Paperwork Reduction Act, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ healthcare research and healthcare information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) 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 upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: July 21, 2011.

Carolyn M. Clancy,

Director.

[FR Doc. 2011–19392 Filed 8–2–11; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-11–11JJ]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Daniel L. Holcomb, CDC Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (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. Written comments should be received within 60 days of this notice.

Proposed Project

Evaluating Locally-Developed HIV Prevention Interventions for African-American MSM in Los Angeles—New—National Center for HIV/AIDS, Viral Hepatitis, STD, TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Data reported from 33 states with HIV reporting indicate the burden of HIV/AIDS is most concentrated in the African American population compared to other racial/ethnic groups. Of the 49,704 African American males diagnosed with HIV between 2001 and 2004, 54% of these cases were among men who have sex with men (MSM). In Los Angeles County (LAC), the proportion of HIV/AIDS cases among African American males attributable to male-to-male sexual transmission is

even greater (75%). In the absence of an effective vaccine, behavioral interventions represent one of the few methods for reducing high HIV incidence among African American MSM (AAMSM). Unfortunately, in the third decade of the epidemic, very few of the available HIV-prevention interventions for African American populations have been designed specifically for MSM. In fact, until very recently none of CDC's evidence-based, HIV-prevention interventions had been specifically tested for efficacy in reducing HIV transmission among MSM of color. Given the conspicuous absence of (1) Evidence-based HIV interventions and (2) outcome evaluations of existing AAMSM interventions, our collaborative team intends to address a glaring research gap by implementing a best-practices model of comprehensive program evaluation.

The purpose of this project is to test, in a real world setting, the efficacy of an HIV transmission prevention intervention for reducing sexual risk among African American men who have sex with men in LAC. The project is a 3-session, group-level intervention that will provide participants with the information, motivation, and skills necessary to reduce their risk of transmitting or acquiring HIV. The intervention will be evaluated using baseline, 3 month and 6 month follow-up assessments. This project will also conduct in-depth qualitative interviews with 36 men in order to assess their experiences with the intervention, elicit recommendations for improving the intervention, and to better understand the factors that put African American MSM at risk for HIV.

CDC is requesting a 3-year clearance for data collection. The data collection system involves screenings, limited locator information, contact information, a baseline questionnaire, client satisfaction surveys, a 3-month follow-up questionnaire, a 6-month follow-up questionnaire, and case study interviews. An estimated 700 men will be screened for eligibility in order to enroll 528 men. The baseline and follow up questionnaires contain questions about participants' socio-demographic information, health and healthcare, sexual activity, substance use, and other psychosocial issues. The duration of each baseline, 3-month, and 6-month questionnaires are estimated to be 60 minutes; the 36 Success Case Study interviews 90 minutes; Outreach Recruitment Assessment 5 minutes; limited locator information form 5 minutes; participant contact information form 10 minutes; each client satisfaction survey 5 minutes. There is no cost to participants other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number responses per espondent	Average burden per respondent (in hours)	Total annual urden in hours
AAMSM	Outreach Recruitment Assessment (screener).	700	1	5/60	58
AAMSM	Limited Locator Information	700	1	5/60	58
Enrolled AAMSM	Participant Contact Information Form.	528	1	10/60	88
Enrolled AAMSM	Baseline Questionnaire	528	1	1	528
Enrolled AAMSM	Client Satisfaction Survey	224	3	5/60	56
Enrolled AAMSM	3 month follow up Questionnaire	420	1	1	420
Enrolled AAMSM	6 month follow up Questionnaire	400	1	1	400
Enrolled AAMSM	Success Case Study Interview	36	1	1.5	54
Total					1662

Dated: July 27, 2011.

Daniel Holcomb,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2011–19614 Filed 8–2–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3143–NC]

Medicare Program; Evaluation Criteria and Standards for Quality Improvement Program Contracts (10th Statement of Work)

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice with comment period.

SUMMARY: This notice with comment period describes the general criteria we intend to use to evaluate the effectiveness and efficiency of Quality Improvement Organizations (QIOs) that will enter into contracts with CMS under the 10th Statement of Work (SOW) on August 1, 2011. The evaluation of a QIOs' performance related to their SOW will be based on evaluation criteria specified for the aims, drivers, tasks, and subtasks set forth in section J–10 of the QIOs' 10th SOW.

DATES: *Effective Date*: August 1, 2011 to July 31, 2014.

Comment Date: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on September 2, 2011.

ADDRESSES: In commenting, please refer to file code CMS–3143–NC. Because of staff and resource limitations, we cannot accept comments by facsimile (Fax) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov*. Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address *only*: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–3143–NC, P.O. Box 8010, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address *only*: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–3143–NC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier*. Alternatively, you may deliver (by hand or courier) your written comments *only* to the following addresses prior to the close of the comment period:

a. For delivery in Washington, DC: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD: Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Alfreda Staton, 410–786–4194.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov*. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

Section 1153(h)(2) of the Social Security Act (the Act) requires the Secretary of the Department of Health and Human Services to publish in the **Federal Register** the general criteria and standards that will be used to evaluate the effective and efficient performance of contract obligations by the Quality Improvement Organizations (QIOs), and to provide the opportunity for public comment with respect to these criteria and standards. This notice describes the general criteria that will be used to evaluate QIO performance under the 10th Statement of Work (SOW) contract beginning August 1, 2011.

II. Provisions of the Notice With Comment Period

Description

Under the 10th SOW, QIOs are responsible for completing the requirements for the following Aims: Beneficiary and Family Centered Care; Improve Individual Care—A Patient Safety Aim with components focused on Healthcare Associated Infections (HAIs), Pressure Ulcers, Physical Restraints, Nursing Home Systemic Improvement, Adverse Drug Events, Quality Reporting and Improvement; Integrate Care for Populations and Communities—A Care Transitions Aim; and Improve Health for Populations and Communities—A Prevention Aim. The ability to achieve the goals for each Aim will be through the following Drivers: Learning and Action Networks, Technical Assistance, and the Care Reinvention through Innovation Spread (CRISP) Model. (Detailed information for each Aim and Driver may be found in sections C.6. through C.10. of the 10th SOW posted at the *http://www.fedbizopps.gov* Web site.)

Beneficiary and Family Centered Care (See Section C.6 of the 10th Statement of Work)

The Beneficiary and Family Centered Care Aim focuses on: QIO statutorily mandated case review activities as well as interventions to promote responsiveness to beneficiary and family needs; providing opportunities for listening to and addressing beneficiary and family concerns; and providing resources for beneficiaries and caregivers in decision making. Beneficiary-generated concerns provide an excellent opportunity to explore root causes, develop alternative approaches to improving care, and improve beneficiary and family experiences with the health care system. Beneficiary and family engagement and activation efforts are needed to produce the best possible outcomes of care. These QIO beneficiary and family centered efforts align with the National Quality Strategy, which encourages patient and family engagement.

Improve Individual Patient Care (Patient Safety) Initiatives (See Section C.7 of the 10th Statement of Work)

The Patient Safety initiatives are designed to help achieve the goals of improving individual patient care by: Reducing Healthcare-Associated Infections (HAIs)—Central Line Bloodstream Infections (CLABSI), Catheter-Associated Urinary Tract Infections (CAUTI), Clostridium Difficile Infections (CDI) and Surgical-Site Infections (SSI); Reducing Healthcare Acquired Conditions in Nursing Homes—Pressure Ulcers and Physical Restraints; Developing a learning and action network to begin to make forward progress toward a safer system of care; reducing Adverse Drug Events (ADEs) and medication-related harm; and providing technical assistance to hospitals to improve their quality of care related to Medicare programs such as the Hospital Inpatient Quality Reporting (IQR) Program and the Hospital Outpatient Quality Reporting (OQR) Program to promote quality improvement and transparency for consumer decision making through publicly reported quality data.

Integrate Care for Populations and Communities (See Section C.8 of the 10th Statement of Work)

The QIO work must improve the quality of care for Medicare beneficiaries who transition among care settings through a comprehensive community effort. These efforts aim to reduce readmissions following hospitalization and to yield sustainable and replicable strategies to achieve high-value health care for sick and disabled Medicare beneficiaries.

Improve Health for Populations and Communities (See Section C.9 of the 10th Statement of Work)

The QIO must improve population and community health through prevention and early diagnosis by: Improving flu immunizations of patients ages 50 and older during the flu season; improving pneumococcal immunization of patients ages 65 and older; improving appropriate low-dose aspirin therapy use in patients with ischemic vascular disease; improving blood pressure control in patients with hypertension; improving low-density lipoprotein-cholesterol (LDL–C) control among adults with ischemic vascular disease; improving tobacco cessation

intervention among adult patients who smoke (screening and cessation counseling); improving colorectal cancer screening in patients ages 50 through 75; improving breast cancer screening in women ages 40 through 69; improving participation in the Physician Quality Reporting System (PQRS); improving the use of Electronic Health Records (EHRs) for care management; and integrating health information technology to achieve meaningful use and improve care coordination and prevention goals.

Drivers—Learning and Action Networks, Technical Assistance, and Care Reinvention Through Innovation Spread (CRISP) Model (See Section C.10 of the 10th Statement of Work)

Learning and Action Networks are mechanisms by which large scale improvement around a given aim is fostered, studied, adapted, and rapidly spread regardless of the change methodology, tools, or time-bounded initiative that is used to achieve the aim. Learning Action Networks collaborate with the Regional Extension Centers with respect to quality improvement and health IT/data related issues. Learning and Action Networks consciously manage knowledge as a valuable resource. They engage leaders around an action based agenda. The network creates opportunities for in-depth learning and problem solving, it accepts all offers of support seeking to catalyze interested parties, and it is transparent, flexible, interchangeable, and purposeful.

It is expected that the QIO will develop and facilitate sustainable Learning and Action Networks within their respective State, as well as participate in CMS supported and facilitated Learning and Action Networks, which will function to support QIO activities at the local level. The QIO must develop a team(s) (number and composition to be determined by the QIO) that is responsible for supporting and facilitating the Learning and Action Networks for their respective State. This team is responsible for creating interest and active participation in the Learning and Action Networks from vested parties within the State around a specific aim(s).

The QIO must provide technical assistance to providers, facilities, and partners. The QIO must offer direct assistance related to quality improvement questions and needs to support local providers in making changes by connecting the requestor with quality improvement knowledge, providing follow-up available at the local and national level. The QIO must rely on their own internal resources, those of the community, those availed by Federal agencies, and those of the National Coordinating Centers. The QIO must provide technical assistance to individual providers, provider groups or health care systems upon their request as well as upon the direction of CMS.

In general, technical assistance is more focused, limited, and directed than activities of the Learning and Action Networks although it could be a component of these activities. Some activities include the following:

- The QIO is expected to develop and spread a sustainable infrastructure by facilitating the adoption of change from the QIO to a provider, provider group or health care system.
- The QIO will ensure that each initiative includes a sustainability plan and the QIO will work to achieve consensus among participants so that the quality improvement efforts will continue as the need continues.
- The QIO will identify pertinent data resources available to support the local provider community. This includes claims data, data organized by other contractors, data available from the Centers for Disease Control, National Institutes of Health, World Health Organization, the Census Bureau, the community information available through the coordinating center, the Center for Medicare and Medicaid Innovation, and the Agency for Healthcare Research and Quality. The QIO must conduct data analysis and develop meaningful data reports to be used by the local provider community, Learning and Action Networks and breakthrough initiatives.

The Care Reinvention through Innovation Spread (CRISP) Model is the framework for supporting the communications and outreach activities required to complete all Aims of the 10th SOW successfully. The CRISP Model is designed to minimize internal fragmentation, siloing, and duplication or conflict of messages across individual QIOs and the QIO Program as a whole. The Model is used through all activities of the 10th SOW so that all QIO operations are stakeholder-centric and focus on at least one of the three phases of communicating with stakeholders about quality improvement work: (1) Initiation and ''will building''; (2) engagement and maintenance; and (3) retention and sustainment throughout the life of the QIO task. The goal of the model is to give access to the right information and services, in the right form, at the right time, to the right people in the right place. The model does this by focusing the QIO's energies such that each policy, action, and decision is made with an educated and strategic consideration of the impacts they may have on stakeholders.

Under the CRISP Model, the QIO must ensure that Innovation Spread Advisors (ISAs) are identified for their State or territory. This individual(s) would bring knowledge to every QIO Aim (or project) team within the enterprise by: Helping the Aim teams determine who the stakeholders are and what they need; ensuring beneficiary input; facilitating the appropriate mechanisms for stakeholder communication; and determining if activities are successful. The ISA(s) from each QIO must attend CMS-sponsored training sessions and serve as brand ambassadors with branding responsibilities as indicated in section C.10.3.

III. Evaluation of the Aims and Drivers (See Section J–10 and Section C.5 of the 10th Statement of Work)

A qualitative and quantitative evaluation will be conducted at the 18th (intermediate evaluation) and 27th months (final evaluation) of the contract with monitoring and measuring for improvement conducted throughout the 3 year contract cycle. The evaluations will be based on the most recent data available to us. The performance results of the evaluation at both time periods (that is, 18 months and 27 months) will be used, in addition to ongoing monitoring activities, to determine the performance on the overall contract. Using lean and rapid techniques, QIOs will be monitored and measured for improvement on an ongoing basis using self-assessment and Contracting Officer Technical Representative (COTR) review. The COTR will complete assessment and review of qualitative and quantitative contract evaluation objectives.

The following categories will serve as the basis for the qualitative evaluation of the Technical Assistance Drivers as specified on Table 1 of section J–10 in the 10th Statement of Work:

- Rapid Cycle Improvement in Quality Improvement Activities and Outputs.
- Customer Focus and Value of the Quality Improvement Activities to Beneficiaries, Participants and CMS.
- Ability To Prepare the Field To Sustain the Improvements.
- Value Innovation.
- Commitment to ''boundarilessness.''
- Unconditional Teamwork.

The quantitative evaluation of the QIOs will be based on the number of commitments secured, participants

engaged, and the results in achievement of the goals as specified on Tables 2 and 3 in section J–10 of the 10th Statement of Work.

The ''Aims Tasks'' the QIO will be evaluated on are as follows:

C.6 Beneficiary and Family Centered Care:

- Case Review;
- Patient and Family Engagement Campaign.

C.7 Improving Individual Patient Care:

- Reduction of Healthcare Associated Infections (CLABSI, CAUTI, CDI, and SSI);
- Reduction of Healthcare Acquired Conditions in Nursing Homes (Pressure Ulcers and the Use of Physical Restraints);
- Reduction of Adverse Drug Events;
- Hospital Inpatient and Outpatient Quality Reporting and Improvement.

C.8 Integrating Care for Populations and Communities:

- Reduction of Hospital Readmissions Through a Comprehensive Community Effort by Improving the Quality of Care for Medicare Beneficiaries Who Transition Among Care Settings.

C.9 Improving Health for Populations and Communities:

- Promotion of Immunizations, Colorectal, and Breast Cancer Screenings;
- Cardiovascular Health Campaign;
- Improving Participation in the Physician Quality Reporting System (PQRS);
- Improving the Use of Electronic Health Records (EHRs) for Care Management;
- Integrating Health Information Technology to Improve Care Coordination, Achieve Meaningful Use, and Achieve Prevention Goals.

The ''Driver Tasks'' the QIO will be evaluated on are as follows:

C.10.1 Supporting and Convening Learning and Action Networks.

C.10.2 Technical Assistance;

C.10.3 Care Reinvention Through Innovation Spread (CRISP) Model.

If a QIO is not tasked to work on a specific area under an ''Aim'' and/or ''Driver,'' the QIO will not be evaluated under that particular area. Any Special Innovation Project that the QIO may carry out will be evaluated separately and will not be considered in the overall evaluation criteria.

In addition to the qualitative and quantitative evaluation in the 18th and 27th months of the contract, we will conduct monitoring activities throughout the course of the contract and will act upon findings as necessary. The performance results of the evaluation at both time periods (that is, 18 months and 27 months) will be used, in addition to ongoing monitoring activities, to determine the overall performance on the contract.

18th Month Contract Evaluation

The 18th month contract evaluation will determine if the QIO has met the performance evaluation criteria as specified in J–10 of this Statement of Work. The achievement within each of the ''Aims'' and ''Drivers'' will be evaluated on an individual basis for appropriate contract action. Though, in general, evaluation of each ''Aim'' and/or ''Driver'' will relate only to that area, we reserve the right to take appropriate contract action in the event of failure in multiple ''Aims'' and/or ''Drivers''.

18th Month Evaluation Criteria:

- Pass: Criteria met for the ''Aim'' and/or ''Driver'' as specified in the evaluation section of the ''Aim'' and/or ''Driver.''
- Fail: Criteria not met for the ''Aim'' and/or ''Driver'' as specified in the evaluation section of the ''Aim'' and/or ''Driver.''

27th Month Contract Evaluation

The 27th month contract evaluation will determine if the QIO has met the performance evaluation criteria as specified in each of the ''Aims'' and ''Drivers'' areas of the 10th SOW. The achievement within the ''Drivers'' and ''Aims'' will be evaluated on an individual basis for appropriate contract action.

27th Month Evaluation Criteria:

- Pass: Criteria met for the ''Aim'' and/or ''Driver'' as specified in the evaluation section of the ''Aim'' and/or ''Driver.''
- Fail: Criteria not met for the ''Aim'' and/or ''Driver'' as specified in the evaluation section of the ''Aim'' and/or ''Driver.''

Overall Contract Evaluation

The results of the 18th and 27th month evaluation periods, in addition to ongoing monitoring activities, will be used to determine how the contractor performed on the overall contract.

If we choose, we may notify the QIO of our intention not to renew the QIO contract and inform the QIO of their rights under the current statute.

Any failure at the 18th or 27th month evaluation for any ''Aim or Driver'' may result in that QIO receiving an adverse past performance evaluation. Further, failure may impact on the QIO's ability to continue similar work in or eligibility for award of the 11th SOW.

The list of measures and performance criteria for each QIO will be recorded on the CMS Dashboard, which will be available on QIOnet (*http://qionet.sdps.org*), the standard information system that supports the QIO Program. We will also post these measures on the publicly accessible CMS Web site (*http://www.cms.gov*).

We will monitor the QIO's performance on the ''Aims'' and ''Drivers'' against established criteria on at least a quarterly basis, and may take appropriate contract action (for example, providing warning for the need for adjustment, instituting a formal correction plan, terminating an activity, or recommending early termination of a contract because of failure to meet contract timelines as specified in sections C.6 through C.10.).

We reserve the right at any point, prior to the notification of our intention not to continue the option for an ''Aim'' and/or ''Driver'' and/or to renew the contract, to revise measures or adjust the expected minimum thresholds for satisfactory performance or remove criteria from an ''Aim'' and/or ''Driver'' evaluation protocol for any reason, including, but not limited to, data gathered based on experience with the amount of improvement achieved during the contract cycle or in pilot projects currently in progress, information gathered through evaluation of the QIO Program overall, or any unforeseen circumstances. Further, in accordance with standard contract procedures, we reserve the right at any time to discontinue an ''Aim'' and/or ''Driver'' or any other part of this contract regardless of QIO performance on the ''Aim'' and/or ''Driver''.

IV. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VI. Regulatory Impact Statement

In accordance with the provisions of Executive Order 12866, this notice was

not reviewed by the Office of Management and Budget.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: June 15, 2011.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2011–19650 Filed 7–29–11; 4:15 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0554]

Agency Information Collection Activities; Proposed Collection; Comment Request; Veterinary Feed Directive

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on reporting and recordkeeping requirements for distribution and use of Veterinary Feed Directive (VFD) drugs and animal feeds containing VFD drugs.

DATES: Submit either electronic or written comments on the collection of information by October 3, 2011.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Juanmanuel Vilela, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–7651, *Juanmanuel.vilela@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Veterinary Feed Directive—21 CFR Part 558 (OMB Control Number 0910–0363)—Extension

With the passage of the Animal Drug Availability Act of 1996 (Pub. L. 104–250), the Congress enacted legislation establishing a new class of restricted feed use drugs, VFD drugs, which may be distributed without involving State pharmacy laws. Although controls on the distribution and use of VFD drugs are similar to those for prescription drugs regulated under section 503(f) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 353(f)), the implementing VFD regulation (21 CFR 558.6) is tailored to the unique circumstances relating to the distribution of medicated feeds. The content of the VFD is spelled out in the regulation. All distributors of medicated feed containing VFD drugs must notify FDA of their intent to distribute, and records must be maintained of the distribution of all medicated feeds containing VFD drugs. The VFD regulation ensures the protection of public health while enabling animal producers to obtain and use needed drugs as efficiently and cost effectively as possible.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
558.6(a)(3) through (a)(5)	15,000	25	375,000	.25	93,750
558.6(d)(1)(i) through (d)(1)(iii)	300	1	300	.25	75
558.6(d)(1)(iv)	20	1	20	.25	5
558.6(d)(2)	1,000	5	5,000	.25	1,250
514.1(b)(9)	1	1	1	3.00	3
Total					95,083

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per record-keeping	Total hours
558.6(c)(1) through (c)(4)	112,500	10	1,125,000	.0167	18,788
558.6(e)(1) through (e)(4)	5,000	75	375,000	.0167	6,263
Total					25,051

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The estimate of the times required for record preparation and maintenance is based on Agency communication with industry and Agency records and experience.

Dated: July 28, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–19603 Filed 8–2–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0258]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Submission of Petitions: Food Additive, Color Additive (Including Labeling), and Generally Recognized as Safe Affirmation; Electronic Submission Using Food and Drug Administration Form 3503

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Submission of Petitions: Food Additive, Color Additive (Including Labeling), and Generally Recognized as Safe Affirmation; Electronic Submission Using Food and Drug Administration Form 3503'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 30, 2010 (75 FR 52954), the Agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0016. The approval expires on June 13, 2014. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain*.

Dated: July 28, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–19602 Filed 8–2–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No.FDA–2011–N–0535]

Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance for Industry: Notification of a Health Claim or Nutrient Content Claim Based on an Authoritative Statement of a Scientific Body

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the collection of information associated with the submission of notifications of health claims or nutrient content claims based on authoritative statements of scientific bodies of the U.S. Government.

DATES: Submit either electronic or written comments on the collection of information by October 3, 2011.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether

the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Guidance for Industry: Notification of a Health Claim or Nutrient Content Claim Based on an Authoritative Statement of a Scientific Body—(OMB Control Number 0910–0374)—Extension

Section 403(r)(2)(G) and (r)(3)(C) of the Federal Food, Drug and Cosmetic Act (the FD&C Act) (21 U.S.C. 343(r)(2)(G) and (r)(3)(C)), as amended by the FDA Modernization Act of 1997, provides that any person may market a food product whose label bears a nutrient content claim or a health claim that is based on an authoritative statement of a scientific body of the U.S. Government or the National Academy of Sciences (NAS). Under this section of the FD&C Act, a person that intends to use such a claim must submit a notification of its intention to use the claim 120 days before it begins marketing the product bearing the claim. In the **Federal Register** of June 11, 1998 (63 FR 32102), FDA announced the availability of a guidance entitled ''Guidance for Industry: Notification of a Health Claim or Nutrient Content Claim Based on an Authoritative Statement of a Scientific Body.'' The guidance provides the Agency's interpretation of terms central to the submission of a notification and the Agency's views on the information that should be included in the notification. The Agency believes that the guidance will enable persons to meet the criteria for notifications that are established in section 403(r)(2)(G) and (r)(3)(C) of the FD&C Act. In addition to the information specifically required by the FD&C Act to be in such notifications, the guidance states that the notifications should also contain information on analytical methodology for the nutrient that is the subject of a claim based on an authoritative statement. FDA intends to review the notifications the Agency receives to ensure that they comply with the criteria established by the FD&C Act.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Section of the FD&C Act	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
403(r)(2)(G) (nutrient content claims)	1	1	1	250	250
403(r)(2)(C) (health claims)	1	1	1	450	450
Guidance for Notifications	2	1	2	1	2
Total					702

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

These estimates are based on FDA's experience with health claims, nutrient content claims, and other similar notification procedures that fall under our jurisdiction. To avoid estimating the number of respondents as zero, the Agency estimates that there will be one or fewer respondents annually for nutrient content claim and health claim notifications. FDA estimates that it will receive one nutrient content claim notification and one health claim notification per year over the next 3 years.

Section 403(r)(2)(G) and (r)(3)(C) of the FD&C Act requires that the notification include the exact words of the claim, a copy of the authoritative statement, a concise description of the basis upon which such person relied for determining that this is an authoritative statement as outlined in the FD&C Act, and a balanced representation of the scientific literature relating to the relationship between a nutrient and a disease or health-related condition to which a health claim refers or to the nutrient level to which the nutrient content claim refers. This balanced representation of the scientific literature is expected to include a bibliography of the scientific literature on the topic of the claim and a brief, balanced account or analysis of how this literature either supports or fails to support the authoritative statement.

Since the claims are based on authoritative statements of a scientific body of the U.S. Government or NAS, FDA believes that the information that is required by the FD&C Act to be submitted with a notification will be readily available to a respondent. However, the respondent will have to collect and assemble that information. Based on communications with firms that have submitted notifications, FDA estimates that 1 respondent will take 250 hours to collect and assemble the information required by the statute for a nutrient content claim notification. Further, FDA estimates that 1 respondent will take 450 hours to collect and assemble the information required by the statute for a health claim notification.

Under the guidance, notifications should also contain information on analytical methodology for the nutrient that is the subject of a claim based on an authoritative statement. The guidance applies to both nutrient content claim and health claim notifications. FDA has determined that this information should be readily available to a respondent and, thus, the Agency estimates that it will take a respondent 1 hour to incorporate the information into each notification. The Agency expects there will be 2 respondents for a total of 2 hours.

Dated: July 28, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–19601 Filed 8–2–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0513]

Proposal To Refuse To Approve a Supplemental New Drug Application for Bromday (Bromfenac Ophthalmic Solution), 0.09%; Opportunity for a Hearing

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA), the Director of

the Center for Drug Evaluation and Research (the Center Director), is proposing to refuse to approve a supplemental new drug application submitted by ISTA Pharmaceuticals, Inc. (ISTA), for a new 2.4 milliliter (mL) fill size for Bromday (bromfenac ophthalmic solution), 0.09%. This notice summarizes the grounds for the proposal of the Center for Drug Evaluation and Research (CDER) and offers ISTA an opportunity to request a hearing on the matter.

DATES: Submit written requests for a hearing by September 2, 2011; submit data in support of the hearing request by October 3, 2011.

ADDRESSES: Submit electronic or written requests for a hearing; any data, information, and analyses justifying the hearing; and any other comments. Submit electronic requests and supporting documents to *http://www.regulations.gov,* or submit written requests and supporting documents to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Identify both electronic and written requests and the supporting documents with the docket number in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Patrick Raulerson, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6368, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION:

I. Background

On March 24, 2005, FDA approved ISTA's new drug application (NDA) 21–664 to market Xibrom (bromfenac sodium ophthalmic solution), 0.09%. On October 16, 2010, FDA approved Bromday (bromfenac ophthalmic solution), 0.09%, through a supplement to NDA 21–664. Xibrom and Bromday are topical ophthalmic solutions supplied as sterile, aqueous eye drops and approved for the treatment of postoperative inflammation and reduction of ocular pain in patients who have undergone cataract extraction. Xibrom is applied to the affected eye twice daily for 2 weeks beginning 24 hours after surgery, whereas Bromday is applied to the affected eye once daily beginning 1 day before surgery and continuing on the day of surgery and for 14 days thereafter. Xibrom currently is approved in 2.5 mL and 5 mL fill sizes, but, as discussed below, the Center is considering steps to address the safety concerns relating to the larger fill size. Bromday is approved in a 1.7 mL fill size.

ISTA submitted supplement 15 to the Xibrom/Bromday NDA on October 18, 2010, seeking approval to market Bromday in a 2.4 mL fill size. ISTA has stated—in its cover letter accompanying supplement 15 and in its request for an opportunity for a hearing—that patients often have cataract removal surgeries in both eyes, and that the 1.7 mL fill size does not contain a sufficient volume of product to treat two eyes for a full course of treatment. The Division of Anti-Infective and Ophthalmology Products (DAIOP) [1] within CDER issued a complete response letter on February 18, 2011, determining that it could not approve supplement 15 in its present form, stating: (1) That the data submitted do not justify the need for increasing the fill volume and creating a new trade size; (2) that current fill volume appears to contain sufficient drug product for a full course of treatment; and (3) that a single bottle of Bromday should not be used to treat more than one eye in a postoperative setting. Furthermore, the February 18, 2011, complete response letter states that ISTA is required to resubmit the application or take other actions available under § 314.110 (21 CFR 314.110) (*i.e.,* withdraw the application or request an opportunity for a hearing).

On May 12, 2011, ISTA submitted a request for an opportunity for a hearing under § 314.110(b)(3) on whether there are grounds under section 505(d) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(d)) for denying approval of supplement 15. Officials from CDER, including the Director of the Office of Antimicrobial Products (OAP), Dr. Edward Cox, held a telephone conference with ISTA on June 22, 2011, and explained that ISTA has not adequately justified the need for a larger fill volume, and that CDER believes that use of a single bottle of Bromday to treat two eyes unacceptably and unnecessarily increases the risk of microbial infection. Accordingly, CDER officials explained that, based on the information before them, they intended to deny approval of supplement 15, but that they are considering whether to present the issue of fill sizes for postoperative topical ophthalmic products to an advisory committee. ISTA was asked whether it would agree to extend the 60-day timeframe for FDA to respond to its request for notice of an opportunity for a hearing (§ 314.110(b)(3)) until after an advisory committee has met, but ISTA has not agreed to such an extension. CDER continues to consider the issue as it relates to other postoperative topical ophthalmic products.

II. Proposal To Refuse To Approve Supplement 15 to NDA 21–664

Under § 314.200(a) (21 CFR 314.200(a)), this notice describes the reasons for the Center's proposal to refuse to approve supplement 15 to NDA 21–664 and the proposed grounds for the order.

ISTA submitted supplement 15 to NDA 21–664, under section 505(b)(1) of the FD&C Act, proposing to market Bromday in a 2.4 mL fill size. ISTA was required to submit, among other things, ''full reports of investigations which have been made to show whether or not such drug is safe for use'' if supplied in the proposed larger fill size (section 505(b)(1)(A) of the FD&C Act). CDER has concluded, however, that ISTA did not provide sufficient data, analysis, and information to determine that Bromday would be safe for use if supplied in the proposed larger fill size.

Specifically, CDER believes that the existing fill size is adequate to treat a single eye. CDER further believes that the proposed larger fill size, for the purpose of treating two eyes with a single bottle, may pose a potential risk of microbial infection associated with use of the product, and that ISTA has not adequately justified the need for that larger fill size. Microbial infection is a significant concern for ophthalmic products with postoperative indications, because an eye whose surface is compromised by a surgical procedure is more prone to infection than an eye with an intact cornea.[2]

The contents of the Bromday bottle could become contaminated with harmful bacteria if the patient accidentally causes the dropper tip to come into contact with any nonsterile surface. Bromday contains benzalkonium chloride as a preservative, but this ingredient only reduces, and does not eliminate, the risk of microbial contamination. Further, although the Bromday labeling advises that patients should ''not touch [the] dropper tip to any surface, as this may contaminate the contents,'' patients may accidentally touch the dropper tip to the surface of the eye or the skin around the eye, which may lead to microbial contamination of the bottle contents. Accordingly, it is not uncommon that

[1] Because of a recent reorganization in the Office of Antimicrobial Products, the Division of Transplant and Ophthalmology Products is now responsible for reviewing the supplement.

[2] See, for example, Yanoff, M. and Duker, *Ophthalmology,* Mosby, 2009 and Arffa, R., *Grayson's Diseases of the Cornea,* Mosby, 1991.

initially sterile topical solutions become contaminated with bacteria during the course of treatment.[3] If the product were to become contaminated with bacteria present on or around the surface of one eye, and the same bottle of product is used in both eyes, the patient could transmit the bacteria from one eye to the other.

The clinical studies conducted by ISTA supporting approval of Bromday and Xibrom specifically excluded treatment of both eyes and excluded the concomitant use of other nonsteroidal anti-inflammatory drugs. There are no data in the application supporting the safe use of a single bottle in more than one eye. ISTA's supplement 15 contained no information, data, or analysis relevant to these risks. As with any NDA, the sponsor bears the burden of supplying necessary data and information to demonstrate safety, and this includes satisfying CDER that a specific safety concern has been adequately addressed. Accordingly, the supplement lacks data, information, or analysis that would allay CDER's concerns about the potential risks associated with the larger fill size. We note that although we did not consider this safety issue at the time of initial approval of Xibrom and certain other products for which this issue may be relevant, as this issue develops, we also intend to take appropriate steps with respect to other products that raise the issue.

III. Notice of Opportunity for a Hearing

For the reasons summarized previously, notice is given to ISTA Pharmaceuticals, Inc., and to all other interested persons, that the Center Director proposes to issue an order under section 505(d) of the FD&C Act refusing to approve supplement 15 to NDA 21–664 on the grounds that ISTA did not include data, information, or analysis sufficient to show that Bromday would be safe for use as labeled if supplied in the proposed 2.4 mL fill size. Specifically, the investigations conducted by ISTA in support of supplement 15 do not include adequate tests by all methods reasonably applicable to show whether or not Bromday would be safe for use as labeled if supplied in the proposed 2.4 mL fill size (section 505(d)(1) of the FD&C Act; § 314.125(b)(2) (21 CFR 314.125(b)(2)), and ISTA did not provide sufficient information about the proposed 2.4 mL fill size to permit CDER to determine whether Bromday is safe for use under the conditions prescribed, recommended, or suggested by its labeling if supplied in a 2.4 mL fill size (section 505(d)(4) of the FD&C Act; § 314.125(b)(4)).

ISTA may request a hearing before the Commissioner of Food and Drugs (the Commissioner) on the Center Director's proposal to refuse to approve supplement 15 to NDA 21–664. If ISTA decides to seek a hearing, it must file: (1) A written notice of participation and request for a hearing (see the **DATES** section of this document); and (2) the studies, data, information, and analyses relied upon to justify a hearing (see the **DATES** section of this document), as specified in § 314.200. As stated in § 314.200(g), a request for a hearing may not rest upon mere allegations or denials, but must present specific facts showing that there is a genuine and substantial issue of fact that requires a hearing to resolve. The failure to request a hearing within the time provided and in the manner required by § 314.200 constitutes a waiver of the opportunity to request a hearing. If a hearing request is not properly submitted, FDA will issue a notice refusing to approve supplement 15 to NDA 21–664.

The Commissioner will grant a hearing if there exists a genuine and substantial issue of fact or if the Commissioner concludes that a hearing would otherwise be in the public interest (§ 314.200(g)(6)). If a hearing is granted, it will be conducted according to the procedures provided in 21 CFR parts 10 through 16 and 21 CFR 314.201.

Paper submissions under this notice of opportunity for a hearing must be filed in four copies. Except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and on the Internet at *http://www.regulations.gov*. This notice is issued under section 505(c)(1)(B) of the FD&C Act, §§ 314.110(b)(3) and 314.200, and under authority delegated to the Director of CDER.

Dated: July 28, 2011.

David Dorsey,

Acting Deputy Commissioner for Policy, Planning and Budget.

[FR Doc. 2011–19566 Filed 8–2–11; 8:45 am]

BILLING CODE 4160–01–P

[3] Jokl D.H. *et al.,* ''Bacterial Contamination of Ophthalmic Solutions Used in an Extended Care Facility,'' *British Journal of Ophthalmology,* 91:1308–1310, 2007.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Physiological Chemistry and Genomics.

Date: August 15, 2011.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Ronald Adkins, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2206, MSC 7890, Bethesda, MD 20892, 301–495–4511, *ronald.adkins@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: July 28, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–19695 Filed 8–2–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Eye Institute Special Emphasis Panel, NEI Research Grant Applications II.

Date: August 16, 2011.

Time: 1:30 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NEI, 5635 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Anne E. Schaffner, PhD, Chief, Scientific Review Officer, Division of Extramural Research, National Eye Institute, National Institutes of Health, 5635 Fishers Lane, Suite 1300, MSC 9300, 301–451–2020, *aes@nei.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Eye Institute Special Emphasis Panel, NEI Institutional Training Grant Applications.

Date: August 22, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Fairmont Hotel Washington DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: Daniel R. Kenshalo, PhD, Scientific Review Officer, Division of Extramural Research, National Eye Institute, National Institutes of Health, 5635 Fishers Lane, Suite 1300, MSC 9300, 301–451–2020, *kenshalod@nei.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: July 28, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–19700 Filed 8–2–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council on Aging.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Aging.

Date: September 20–21, 2011.

Closed: September 20, 2011, 3 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, C Wing, Conference Room 10, Bethesda, MD 20892.

Open: September 21, 2011, 8 a.m. to 1:30 p.m.

Agenda: Call to order; Director's Status Report; discussion of future meeting dates; consideration of minutes from last meeting; reports from the Task Force on Minority Aging Research, the Working Group on Program, NIA Funding Policies and Scientific Review Branch Council; Council speakers; Program highlights.

Place: National Institutes of Health, Building 31, 31 Center Drive, C Wing, Conference Room 10, Bethesda, MD 20892.

Contact Person: Robin Barr, PhD, Director, National Institute on Aging, Office of Extramural Activities, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20814, (301) 496–9322, *barrr@nia.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nih.gov/nia/naca/,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: 7/28/2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–19698 Filed 8–2–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Environmental Health Sciences Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Environmental Health Sciences Council.

Date: September 1–2, 2011.

Open: September 1, 2011, 8:30 a.m. to 2 p.m.

Agenda: Discussion of program policies and issues.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Closed: September 1, 2011, 2:15 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Open: September 2, 2011, 8:30 a.m. to 12:15 p.m.

Agenda: Discussion of program policies and issues.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Contact Person: Gwen W Collman, PhD, Interim Director, Division of Extramural Research & Training, National Institutes of Health, Nat. Inst. of Environmental Health Sciences, 615 Davis Dr., KEY615/3112, Research Triangle Park, NC 27709, (919) 541–4980, *collman@niehs.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.niehs.nih.gov/dert/c-agenda.htm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: *July 27, 2011.*

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–19693 Filed 8–2–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, RFA Panel: Investigations on Primary Immunodeficiency Diseases.

Date: August 25, 2011.

Time: 3 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Scott Jakes, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4198, MSC 7812, Bethesda, MD 20892, 301–495–1506, *jakesse@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: July 27, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–19688 Filed 8–2–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2011–0710]

Information Collection Requests to Office of Management and Budget

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit Information Collection Requests (ICRs) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval of revisions to the following collections of information: 1625–0001, Marine Casualty Information & Periodic Chemical Drug and Alcohol Testing of Commercial Vessel Personnel; 1625–0013, Plan Approval and Records for Load Lines—Title 46 CFR Subchapter E; 1625–0097, Plan Approval and Records for Marine Engineering Systems—46 CFR subchapter F; and 1625–0101, Periodic Gauging and Engineering Analyses for Certain Tank Vessels Over 30 Years Old. Our ICRs describe the information we seek to collect from the public. Before submitting these ICRs to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before October 3, 2011.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2011–0710] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT). To avoid duplicate submissions, please use only one of the following means:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251. To ensure your comments are received in a timely manner, mark the fax, to attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at Room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

Copies of the ICRs are available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: COMMANDANT (CG–611), ATTN: PAPERWORK REDUCTION ACT MANAGER, U.S. COAST GUARD, 2100 2ND ST. SW., STOP 7101, WASHINGTON, DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Contact Ms. Kenlinishia Tyler, Office of Information Management, telephone 202–475–3652, or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collections. There is one ICR for each Collection.

The Coast Guard invites comments on whether these ICRs should be granted based on the Collections being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collections; (2) the accuracy of the estimated burden of the Collections; (3) ways to enhance the quality, utility, and clarity of information subject to the Collections; and (4) ways to minimize the burden of the Collections on respondents, including the use of automated collection techniques or other forms of information technology. In response to your comments, we may revise these ICRs or decide not to seek approval for the Collections. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2011–0710], and must be received by October 3, 2011. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the ''Privacy Act'' paragraph below.

Submitting Comments

If you submit a comment, please include the docket number [USCG–2011–0710], indicate the specific section of the document to which each comment applies, providing a reason for each comment. You may submit your comments and material online (*via http://www.regulations.gov*), by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the DMF. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

You may submit your comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. To submit your comment online, go to *http://www.regulations.gov,* and type ''USCG–2011–0710'' in the ''Keyword'' box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½; by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

Viewing comments and documents: To view comments, as well as documents mentioned in this Notice as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–0710'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the DMF in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act

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

Information Collection Requests

1. *Title:* Marine Casualty Information & Periodic Chemical Drug and Alcohol Testing of Commercial Vessel Personnel.

OMB Control Number: 1625–0001.

Summary: Marine casualty information is needed for CG investigations of commercial vessel casualties involving death, vessel damage, etc., as mandated by Congress. Chemical testing information is needed to improve CG detection/reduction of drug use by mariners.

Need: Section 6101 of 46 U.S.C., as delegated by the Secretary of Homeland Security to the Commandant, authorizes the Coast Guard to prescribe regulations for the reporting of marine casualties involving death, serious injury, material loss of property, material damage affecting the seaworthiness of a vessel, or significant harm to the environment. It also requires information on the use of alcohol be included in a marine casualty report. Section 7503 of 46 U.S.C. authorizes the Coast Guard to deny the issuance of licenses, certificates of registry, and merchant mariner's documents (seaman's papers) to users of dangerous drugs. Similarly, 46 U.S.C. 7704 requires the Coast Guard to revoke such papers when a holder of the same has been shown to be a drug user unless the holder provides satisfactory proof that the holder is cured.

Forms: CG–2692, CG–2692A, CG–2692B.

Respondents: Vessel owners and operators.

Frequency: On occasion.

Burden Estimate: The estimated burden has increased from 15,753 hours to 16,194 hours a year.

2. *Title:* Plan Approval and Records for Load Lines—Title 46 CFR Subchapter E.

OMB Control Number: 1625–0013.

Summary: This information collection is required to ensure that certain vessels are not overloaded—as evidenced by the submerging of their assigned load line. In general, vessels over 150 gross tons or 24 meters (79 feet) in length engaged in commerce on international or coastwise voyages by sea are required to obtain a Load Line Certificate.

Need: Title 46 U.S.C. 5101 to 5116 provides the Coast Guard with the authority to enforce provisions of the International Load Line Convention, 1966. Title 46 CFR chapter I, subchapter E—Load Lines, contain the relevant regulations.

Forms: Not applicable.

Respondents: Owners and operators of vessels.

Frequency: On occasion.

Burden Estimate: The estimated burden has increased from 1,699 hours to 1,761 hours a year.

3. *Title:* Plan Approval and Records for Marine Engineering Systems—46 CFR Subchapter F.

OMB Control Number: 1625–0097.

Summary: This collection of information requires an owner or builder of a commercial vessel to submit to the U.S. Coast Guard for review and approval, plans pertaining to marine engineering systems to ensure that the vessel will meet regulatory standards.

Need: Under 46 U.S.C. 3306, the Coast Guard is authorized to prescribe vessel safety regulations including those related to marine engineering systems. Title 46 CFR Subchapter F prescribes those requirements. The rules provide the specifications, standards and requirements for strength and adequacy of design, construction, installation, inspection, and choice of materials for machinery, boilers, pressure vessels, safety valves, and piping systems upon which safety of life is dependent.

Forms: None.

Respondents: Owners and builders of commercial vessels.

Frequency: On occasion.

Burden Estimate: The estimated burden has increased from 3,312 hours to 3,695 hours a year.

4. *Title:* Periodic Gauging and Engineering Analyses for Certain Tank Vessels Over 30 Years Old.

OMB Control Number: 1625–0101.

Summary: The Oil Pollution Act of 1990 required the issuance of regulations related to the structural integrity of tank vessels, including periodic gauging of the plating thickness of tank vessels over 30 years old. This collection of information is used to verify the structural integrity of older tank vessels.

Need: Title 46 USC 3703 authorizes the Coast Guard to prescribe regulations related to tank vessels, including design, construction, alteration, repair, and maintenance. Title 46 CFR 31.10–21a prescribes the regulations related to periodic gauging and engineering analyses of certain tank vessels over 30 years old.

Forms: None.

Respondents: Owners and operators of certain tank vessels.

Frequency: Every 5 years.

Burden Estimate: The estimated burden has decreased from 9,918 hours to 7,946 hours a year.

Dated: July 28, 2011.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2011–19610 Filed 8–2–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2011–0158]

Collection of Information Under Review by Office of Management and Budget

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval of a revision to the following collection of information: 1625–0109, Drawbridge Operation Regulations. Before submitting this ICR to OMB, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before September 2, 2011.

ADDRESSES: To avoid duplicate submissions to the docket [USCG–2011–0158], please use only one of the following means:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* Docket Management Facility (DMF) (M–30), U.S. Department of Transportation (DOT), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand deliver:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

A copy of the ICR is available through the docket on the Internet at *http://www.regulations.gov.* Additionally, a copy is available from: Commandant (CG–611), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2100 2nd St., SW., Stop 7101, Washington, DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Ms. Kenlinishia Tyler, Office of Information Management, telephone 202–475–3652, or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collections. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of information subject to the collection; and (4) ways to minimize the burden of the collections on respondents, including the use of automated collection techniques or other forms of information technology. These comments will help OIRA determine whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG 2011–0158], and must be received by September 2, 2011. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the ''Privacy Act'' paragraph below.

Submitting comments: If you submit a comment, please include the docket number [USCG–2011–0158], indicate the specific section of the document to which each comment applies, providing a reason for each comment. You may submit your comments and material online (via *http://www.regulations.gov*), by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the DMF. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

You may submit your comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. To submit

your comment online, go to *http://www.regulations.gov,* and type ''USCG–2011–0158'' in the ''Keyword'' box. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this Notice as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–0158'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the DMF in room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

OIRA posts its decisions on ICRs online at *http://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: [1625–0109].

Privacy Act

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

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard has published the 60-day notice (76 FR 27073, May 10, 2011) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments.

Information Collection Request

Title: Drawbridge Operation Regulations.

OMB Control Number: 1625–0109.

Type of Request: Revision of a currently approved collection.

Summary: The Bridge Administration receives approximately 150 requests from bridge owners or the general public per year to change the operating schedule of various drawbridges across the navigable waters of the United States. The information needed for the change to the operating schedule can only be obtained from the bridge owner and is generally provided to the Coast Guard in a written format.

Need: Title 33 U.S.C. 499 authorizes the Coast Guard to change the operating schedules drawbridges that cross over navigable waters of the United States.

Forms: None.

Respondents: The public and private owners of bridges over navigable waters of the United States.

Frequency: On occasion.

Burden Estimate: The estimated burden remains the same at 150 hours a year.

Dated: July 28, 2011.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2011–19609 Filed 8–2–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2011–0728]

Information Collection Request to Office of Management and Budget

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval of revisions to the following collection of information: 1625–0018, Official Logbook. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before October 3, 2011.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2011–0728] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT). To avoid duplicate submissions, please use only one of the following means:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251. To ensure your comments are received in a timely manner, mark the fax, to attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

A copy of the ICR is available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: COMMANDANT (CG–611), ATTN: PAPERWORK REDUCTION ACT MANAGER, U.S. COAST GUARD, 2100 2ND STREET, SW, STOP 7101, WASHINGTON, DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Contact Ms. Kenlinishia Tyler, Office of Information Management, telephone 202–475–3652, or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate

comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. In response to your comments, we may revise this ICR or decide not to seek approval of revisions of the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2011–0728], and must be received by October 3, 2011. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the ''Privacy Act'' paragraph below.

Submitting Comments

If you submit a comment, please include the docket number [USCG–2011–0728], indicate the specific section of the document to which each comment applies, providing a reason for each comment. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the DMF. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

You may submit your comments and material by electronic means, mail, fax, or hand delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. To submit your comment online, go to *http://www.regulations.gov,* and type ''USCG–2011–0728'' in the ''Keyword'' box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this Notice as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–0728'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the DMF in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act

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

Information Collection Request

Title: Official Logbook.

OMB Control Number: 1625–0018.

Summary: The Official Logbook contains information about the voyage, the vessel's crew, drills, watches, and operations conducted during the voyage. Official Logbook entries identify particulars of the voyage, including the name of the ship, official number, port of registry, tonnage, names and merchant mariner credential numbers of the master and crew, the nature of the voyage, and class of ship. In addition, it also contains entries for the vessel's drafts, maintenance of watertight integrity of the ship, drills and inspections, crew list and report of character, a summary of laws applicable to Official Logbooks, and miscellaneous entries.

NEED: Title 46, United States Code (U.S.C.) 11301, 11302, 11303, and 11304 require applicable merchant vessels to maintain an Official Logbook. The Official Logbook contains information about the vessel, voyage, crew, and watch. Lack of these particulars would make it difficult for a seaman to verify vessel employment and wages, and for the Coast Guard to verify compliance with laws and regulations concerning vessel operations and safety procedures. The Official Logbook serves as an official record of recordable events transpiring at sea such as births, deaths, marriages, disciplinary actions, etc. Absent the Official Logbook, there would be no official civil record of these events. The courts accept log entries as proof that the logged event occurred. If this information was not collected, the Coast Guard's commercial vessel safety program would be negatively impacted, as there would be no official record of U.S. merchant vessel voyages. Similarly, those seeking to prove that an event required to be logged occurred would not have an official record available.

Forms: CG–706B.

Respondents: Federal agency maritime casualty investigators, Coast guard inspectors, and shipping companies.

Frequency: On occasion.

Burden Estimate: The estimated burden is 1,750 hours a year.

Dated: July 28, 2011.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2011–19608 Filed 8–2–11; 8:45 am]

BILLING Code 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2011–0011]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, OMB No. 1660–0061; Federal Assistance to Individuals and Households Programs

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 30-day notice and request for comments; extension, without change, of a currently approved information collection; OMB No. 1660–0061; FEMA Form 010–0–11 (previously FEMA Form 90–153), Administrative Option Agreement for the Other Needs provision of Individuals and Households Program, (IHP); FEMA Form 010–0–12, Request for Continued Assistance (Application for Continued Temporary Housing Assistance).

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of

respondents, the estimated burden (i.e., the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before September 2, 2011.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or e-mail address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: Federal Assistance to Individuals and Households Programs.

Type of information collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0061.

Form Titles and Numbers: FEMA Form 010–0–11 (previously FEMA Form 90–153), Administrative Option Agreement for the Other Needs provision of Individuals and Households Program, (IHP); FEMA Form 010–0–12, Request for Continued Assistance (Application for Continued Temporary Housing Assistance).

Abstract: The Federal Assistance to Individuals and Households Program (IHP) enhances applicants' ability to request approval of late applications, request continued assistance, and appeal program decisions. Similarly, it allows States to partner with FEMA for delivery of disaster assistance under the ''Other Needs'' provision of the IHP through Administrative Option Agreements and Administration Plans addressing the level of managerial and resource support necessary.

Affected Public: Individuals or Households; State, Local or Tribal Government.

Estimated Number of Respondents: 321,042.

Frequency of Response: On occasion.

Estimated Average Hour Burden per Respondent: Request for Approval of Late Registration, 45 minutes; Request for Continued Assistance, FEMA Form 010–0–12, 1 hour; Appeal of Program Decision, 45 minutes; Administrative Option Agreement (for the other needs provision of IHP), FEMA Form 010–0–11 (previously FF 90–153), 1 hour; Development of State Administrative Plan for the other needs provision of IHP, 2 hours.

Estimated Total Annual Burden Hours: 500,803 hours.

Estimated Cost: There is no capital, start-up, operation or maintenance cost associated with this collection.

Dated: July 8, 2011.

Lesia M. Banks,

Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2011–19541 Filed 8–2–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1996–DR; Docket ID FEMA–2011–0001]

Montana; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Montana (FEMA–1996–DR), dated June 17, 2011, and related determinations.

DATES: *Effective Date:* July 22, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective July 22, 2011.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–19543 Filed 8–2–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1996–DR; Docket ID FEMA–2011–0001]

Montana; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Montana (FEMA–1996–DR), dated June 17, 2011, and related determinations.

DATES: *Effective Date:* July 22, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Montana is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of June 17, 2011.

Daniels, Deer Lodge, Flathead, Glacier, Granite, Jefferson, Lewis and Clark, Liberty, Madison, Park, Pondera, Powell, Ravalli, Richland, Sheridan, Teton and Toole Counties, and the Blackfeet Indian Reservation for Public Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–19542 Filed 8–2–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–TSA–2007–28572]

Intent to Request Renewal From OMB of One Current Public Collection of Information: Secure Flight Program

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-day Notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0046, abstracted below that we will submit to OMB for renewal in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. The collection involves passenger information which certain U.S. aircraft operator and foreign air carriers submit to Secure Flight for the purposes of watch list matching.

DATES: Send your comments by October 3, 2011.

ADDRESSES: Comments may be e-mailed to *TSAPRA@dhs.gov* or delivered to the TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Joanna Johnson at the above address, or by telephone (571) 227–3651.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

OMB Control Number 1652–0046; Secure Flight Program, 49 CFR part 1560

The Transportation Security Administration collects information from covered aircraft operators, including foreign air carriers, in order to perform watch list matching under the Secure Flight Program. The collection covers passenger reservation data for covered domestic and international flights within, to, from or over the continental United States. The collection also covers the collection from covered aircraft operators of certain identifying information for non-traveling individuals that the aircraft operators seek to authorize to enter a sterile area at a U.S. airport, for example, to escort a minor or a passenger with disabilities or for another approved purpose. The collection also covers passenger data for charter operators and lessors of aircraft with a maximum takeoff weight of over 12,500 pounds. The collection also covers certain identifying information for non-traveling individuals that airport operators seek to authorize to enter a sterile area at a U.S. airport, for example, to patronize a restaurant. The collection will also cover a survey of certain general aviation aircraft operators that may be covered by Secure Flight in the future. The current estimated annual reporting burden is 902,826.

Issued in Arlington, Virginia, on July 27, 2011.

Joanna Johnson,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2011–19569 Filed 8–2–11; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5481–N–10]

Notice of Proposed Information Collection: Comment Request; Application for Displacement/Relocation/Temporary Relocation Assistance for Person

AGENCY: Office of the Assistant Secretary for Community Planning and Development, 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:* October 3, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Rudene Thomas, Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street, SW., Room 7256, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Janice Olu, Relocation Specialist, Relocation and Real Estate Division, DGHR, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7168, Washington DC 20410; e-mail *Janice.P.Olu@hud.gov,* (202) 708–2684. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from HUD's Web site at *http://www.hud.gov/offices/cpd/library/relocation/forms.cfm* or from Ms. Olu.

SUPPLEMENTARY INFORMATION: The Department is submitting 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: Application for Displacement/Relocation/Temporary Relocation Assistance for Person.

OMB Control Number, if applicable: 2506–0016.

Description of the need for the information and proposed use: Application for displacement/relocation assistance for persons (families, individuals, businesses, nonprofit organizations and farms) displaced by, or temporarily relocated for, certain HUD programs. No changes are being made for Forms HUD–40030, HUD–40054, 40055, HUD–40056, HUD–40057, HUD–40058, HUD–40061, and HUD–40072.

Agency form numbers, if applicable: HUD–40030, HUD–40054, HUD–40055, HUD–40056, HUD–40057, HUD–40058, HUD–40061, and HUD–40072.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response.

Status of the proposed information collection: Renewal.

Number of Respondents: 37,800.

Frequency of Response: 3.

Hours per Response: .8.

Total Estimated Burden Hours: 91,000 (no change).

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: July 15, 2011.

Clifford Taffet,

General Deputy Assistant Secretary.

[FR Doc. 2011–19574 Filed 8–2–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–75]

Notice of Submission of Proposed Information Collection to OMB Mortgagor's Certification of Actual Cost

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Mortgagor's Certificate of Actual Cost is submitted by the mortgagor to certify actual costs of development in order to make an informed determination of mortgage insurance acceptability and to prevent windfall profits. Its use provides a base for evaluating housing programs, labor costs, and physical improvements in connection with the construction of multifamily housing.

DATES: *Comments Due Date:* September 2, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal.

Comments should refer to the proposal by name and/or OMB approval Number (2502–0112) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail *OIRA–Submission@omb.eop.gov fax:* 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Mortgagor's Certification of Actual Cost.

OMB Approval Number: 2502–0112.

Form Numbers: None.

Description of the Need for the Information and its Proposed Use: The Mortgagor's Certificate of Actual Cost is submitted by the mortgagor to certify actual costs of development in order to make an informed determination of mortgage insurance acceptability and to prevent windfall profits. Its use provides a base for evaluating housing programs, labor costs, and physical improvements in connection with the construction of multifamily housing.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per responses	=	Burden hours
Reporting Burden	419	1		8		3,352

Total Estimated Burden Hours: 1,457.

Status: Extension without change of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: July 27, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–19585 Filed 8–2–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–73]

Notice of Submission of Proposed Information Collection to OMB; Assessment of Native American, Alaska Native, and Native Hawaiian Housing Needs

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The goals of the proposed study are to provide clear, credible, and consistent information describing the needs of the Native American, Alaska Native, and Native Hawaiian populations with respect to both their housing conditions and socio-economic situations. The proposed data collection and analyses will be used to inform policy in ways that enable Tribes to more effectively use resources to improve housing conditions. UI performed a similar assessment in 1996, prior to the passage of the Native American Housing Assistance and Self-Determination Act (NAHASDA) of 1996 that fundamentally changed the way Federal funding is delivered to Tribal people. Issues surrounding the changes NAHASDA introduced also are a key part of the proposed study.

DATES: *Comments Due Date:* September 19, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Approval Number (2528-Pending) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail *OIRA-Submission@omb.eop.gov; fax:* 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Assessment of Native American, Alaska Native, and Native Hawaiian Housing Needs.

OMB Approval Number: 2528-Pending.

Form Numbers: None.

Description of the Need for the Information and its Proposed Use: The goals of the proposed study are to provide clear, credible, and consistent information describing the needs of the Native American, Alaska Native, and Native Hawaiian populations with respect to both their housing conditions and socio-economic situations. The proposed data collection and analyses will be used to inform policy in ways that enable Tribes to more effectively use resources to improve housing conditions. UI performed a similar assessment in 1996, prior to the passage of the Native American Housing Assistance and Self-Determination Act (NAHASDA) of 1996 that fundamentally changed the way Federal funding is delivered to Tribal people. Issues surrounding the changes NAHASDA introduced also are a key part of the proposed study.

Frequency of Submission: On occasion, Annually.

	Number of respondents	Annual responses	x	Hours per response	=	Burden hours
Reporting Burden	2,045	1		0.778		1,592

Total Estimated Burden Hours: 1,592.

Status: New collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: July 26, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–19587 Filed 8–2–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5481–N–12]

Notice of Proposed Information Collection: Loan Guarantee Recovery Fund; Comment Request

AGENCY: Office of the Assistant Secretary for Community Planning and Development, 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:* October 3, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to

the proposal by name and/or OMB Control Number and should be sent to: Rudene Thomas, Reports Liaison Officer, Department of Housing Urban and Development, 451 7th Street, SW., Room 7256, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Jackie L. Williams, Ph.D., Director, Office of Rural Housing and Economic Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7137, Washington, DC 20410, *telephone:* (202) 708–2290 (this is not a toll-free number), for copies of the proposed forms and other available documents:

SUPPLEMENTARY INFORMATION: The Department is submitting 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 affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Loan Guarantee Recovery Fund.

OMB Control Number, if applicable: 2506–0159.

Description of the need for the information and proposed use: To appropriately determine whether entities that submit applications for assistance under the Loan Guarantee Recovery Fund (Section 4 of the Church Arson Prevention Action of 1996) are eligible applicants and submit applications otherwise in compliance with the regulations, certain information is required. Among other necessary criteria, HUD must determine whether: (1) the Financial institution is eligible as defined at 24 CFR Section 573.2 of the regulation; (2) the borrower is eligible as defined under 24 CFR Section 4; (3) the loan will assist in addressing damage or destruction caused by acts of arson or terrorism; (4) the activities which will be assisted by the guaranteed loans are eligible activities under 573.3; (5) the financial institution utilizes sufficient underwriting standards; and (6) the assisted activities will comply with all applicable environmental laws requirements.

Agency form numbers, if applicable: Form HUD–40076 LGA (1/2005).

Members of affected public: Financial institutions such as banks, trust companies, savings and loan associations, credit unions, mortgage companies, or other issues regulated by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Credit Union Administration, or the U.S. Comptroller of the Currency. Certain not-for-profit organizations affected by acts of arson or terrorism.

Estimation of the total numbers of hours needed to prepare the Information collection including number of respondents frequency of response, and hours of response. A total of 79 respondents are expected and the total estimated burden hours are 1,752.

Status of the proposed information collection: The Department does not have a critical mass of respondents to serve as a source of information from which conclusions can be drawn with respect to the accuracy of its current estimates.

Authority: The Paperwork Reduction Act of 1995. 44 U.S.C. Chapter 35, as amended.

Dated: July 20, 2011.

Clifford D. Taffet,

General Deputy Assistant, Secretary for Community Planning and Development.

[FR Doc. 2011–19591 Filed 8–2–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Docket No. FR–5484–N–25]

Notice of Proposed Information Collection: Comment Request; Application for FHA Insured Mortgages

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, 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:* October 3, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Arlene Nunes, Deputy Director, Home Mortgage Insurance Division, Office of Single Family Program Development Division, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–2121 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection requirements to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who will respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Requirements for Single Family Mortgage Instruments.

OMB Control Number, if applicable: 2502–0404.

Description of the need for the information and proposed use: The lender or designee prepares the mortgage and mortgage note that are to be insured by the Department. In accordance with the subject policy, the lender must include language in the mortgage, mortgage note, deed of trust, etc., that accomplishes the requirements of the Department for mortgage insurance. The lender must ensure that the mortgage and the note contain these provisions and do not include

provisions that conflict. If these requirements are not observed, FHA may insure a mortgage that fails to comply with statutory and regulatory requirements established to protect the interest of the government. For each mortgage, the lender or designee must provide the name of the mortgagor, the legal description of the property, and the term and rate of the mortgage to be insured. A lender must develop or procure mortgage and note forms that comply with both HUD and applicable state and local requirements for a recordable and enforceable mortgage. Proof of recoding is often found on the document; a recorded document normally has a seal or other marking that indicates where it may be found in the land records. Either proof of recordation or a certified copy of the document with the recordation seal will meet this requirement.

Agency form numbers, if applicable: None.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The frequency of response is one document per loan and the total number of burden hours for entry is 30 minutes per endorsed case. The total number of responses is 1,623,947 which represent the total number of FHA cases endorsed. The total number of burden hours is estimated at 811,973 which represent the time required to prepare the required documents for FHA cases insured.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: July 25, 2011.

Ronald Y. Spraker,

Associate General Deputy Assistant Secretary for Housing-Associate Deputy Federal Housing Commissioner.

[FR Doc. 2011–19590 Filed 8–2–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–74]

Notice of Submission of Proposed Information Collection to OMB; Notice of Funding Availability for the Transformation Initiative: Sustainable Construction in Indian Country Grant Program

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

HUD invites applicants to submit proposals for funding to develop, deploy, and disseminate methods of sustainable construction suitable for use in Native American housing. HUD is looking for applications on curriculum development/training and information dissemination related to sustainable construction in four broad areas: Moisture management, retrofit strategies, home performance verification, and sustainable construction fundamentals.

DATES: *Comments Due Date:* September 2, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2528—Pending) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; *e-mail OIRA-Submission@omb.eop.gov; fax:* 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Notice of Funding Availability for the Transformation Initiative: Sustainable Construction in Indian Country Grant Program.

OMB Approval Number: 2528—Pending.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: HUD invites applicants to submit proposals for funding to develop, deploy, and disseminate methods of sustainable construction suitable for use in Native American housing. HUD is looking for applications on curriculum development/training and information dissemination related to sustainable construction in four broad areas: Moisture management, retrofit strategies, home performance verification, and sustainable construction fundamentals.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	20	2		24.5		980

Total Estimated Burden Hours: 980.
Status: New collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: July 27, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–19586 Filed 8–2–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–76]

Notice of Submission of Proposed Information Collection to OMB; HUD Loan Sales Bidder Qualification Statement

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Bidder Qualifications Statement solicits from prospective bidders the basic qualifications required for bidding including but not limited to, purchaser information (name of purchaser, corporation entity, address, tax ID), business type, net worth and equity size. By executing the Qualification Statement, the purchaser certifies, represents and warrants to HUD that each of the statements included are true and correct as to the purchaser and thereby qualifies them to bid.

DATES: *Comments Due Date:* September 2, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0576) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail *OIRA-Submission@omb.eop.gov;* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: HUD Loan Sales Bidder Qualification Statement.

OMB Approval Number: 2502–0576.

Form Numbers: None.

Description of the need for the Information and its Proposed Use:

The Bidder Qualifications Statement solicits from prospective bidders the basic qualifications required for bidding including but not limited to, purchaser information (name of purchaser, corporation entity, address, tax ID), business type, net worth and equity size. By executing the Qualification Statement, the purchaser certifies, represents and warrants to HUD that each of the statements included are true and correct as to the purchaser and thereby qualifies them to bid.

Frequency Of Submission: On occasion.

	Number of respondents	Annual responses	x	Hours per response	=	Burden hours
Reporting Burden:	250	4.16		0.25		260

Total Estimated Burden Hours: 260.

Status: Revision of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: July 27, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–19584 Filed 8–2–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–78]

Notice of Submission of Proposed Information Collection to OMB; Use Restriction Agreement Monitoring and Compliance

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

This information is used to ensure monitor and ensure that units are maintained and used solely as rental housing in accordance with the terms of the Use Agreement through the original maturity date of the mortgage. This information is also monitored by HUD (via form HUD–90075) to ensure compliance with the executed and recorded Use Agreement.

DATES: *Comments Due Date:* September 2, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0577) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington,

DC 20503; e-mail *OIRA-Submission@omb.eop.gov;* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Use Restriction Agreement Monitoring and Compliance.

OMB Approval Number: 2502–0577.

Form Numbers: HUD–93140, HUD–93155, HUD–90068, HUD–39144, HUD–90060, HUD–90065, HUD–90067, HUD–93150, HUD–90075, HUD–90066, HUD–90061, HUD–93142, HUD–93143, HUD–90069, HUD–90070.

Description of the Need for the Information and its Proposed Use: This information is used to ensure monitor and ensure that units are maintained and used solely as rental housing in accordance with the terms of the Use Agreement through the original maturity date of the mortgage. This information is also monitored by HUD (via form HUD–90075) to ensure compliance with the executed and recorded Use Agreement.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	590	1		1.884		1,112

Total Estimated Burden Hours: 1,112.

Status: Extension without change of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: July 28, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–19575 Filed 8–2–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–77]

Notice of Submission of Proposed Information Collection to OMB; Manufactured Housing Installation Program Reporting Requirements

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Manufactured Housing Installation Program establishes regulations for the administration of an installation program and establishes a new manufactured housing installation program for States that choose not to implement their own programs. HUD uses the information collected for the enforcement of the Model Installation Standards in each State that does not have an installation program established by State law to ensure that the minimum criteria of an installation program are met.

DATES: *Comments Due Date:* September 2, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Approval Number (2502–0578) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail *OIRA-Submission@omb.eop.gov;* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Manufactured Housing Installation Program Reporting Requirements.

OMB Approval Number: 2502–0578.

Form Numbers: HUD–302, HUD–305, HUD–306, HUD–307, HUD–308, HUD–309, HUD–312.

Description of the need for the Information and its Proposed Use: The Manufactured Housing Installation Program establishes regulations for the administration of an installation program and establishes a new manufactured housing installation

program for States that choose not to implement their own programs. HUD uses the information collected for the enforcement of the Model Installation Standards in each State that does not have an installation program established by State law to ensure that the minimum criteria of an installation program are met.

Frequency of Submission: On occasion, Monthly, Other (describe) per home.

	Number of respondents	Annual responses	x	Hours per response	=	Burden hours
Reporting Burden	6,479	53.01		0.433		148,813

Total Estimated Burden Hours: 148,813.

Status: Extension without change of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: July 28, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–19583 Filed 8–2–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2011–N145; 20124–1113–0000–F5]

Endangered and Threatened Species Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications; request for public comment.

SUMMARY: The following applicants have applied for scientific research permits to conduct certain activities with endangered species under the Endangered Species Act of 1973, as amended (Act). The Act requires that we invite public comment on these permit applications.

DATES: To ensure consideration, written comments must be received on or before September 2, 2011.

ADDRESSES: Written comments should be submitted to the Chief, Endangered Species Division, Ecological Services, P.O. Box 1306, Room 6034, Albuquerque, NM 87103. Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act. Documents will be available for public inspection, by appointment only, during normal business hours at the U.S. Fish and Wildlife Service, 500 Gold Ave., SW., Room 6034, Albuquerque, NM. Please refer to the respective permit number for each application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Susan Jacobsen, Chief, Endangered Species Division, P.O. Box 1306, Albuquerque, NM 87103; (505) 248–6920.

SUPPLEMENTARY INFORMATION:

Public Availability of Comments

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, we cannot guarantee that we will be able to do so.

Permit TE–800611

Applicant: SWCA Inc, San Antonio, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys for the following species within Texas:

- Ocelot (*Leopardus pardalis*).
- Jaguarundi (*Herpailurus yagouaroundi*).
- Golden-cheeked warbler (*Dendroica chrysoparia*).
- Black-capped vireo (*Vireo atricapilla*).
- Interior least tern (*Sterna antillarum athalassos*).
- Northern aplomado falcon (*Falco femoralis septentrionalis*).
- Red-cockaded woodpecker (*Picoides borealis*).
- Houston toad (*Bufo houstonensis*).
- Barton Springs salamander (*Eurycea sosorum*).
- San Marco salamander (*Eurycea nana*).
- Texas blind salamander (*Typhlomolge rathbuni*).
- Fountain darter (*Etheostoma fonticola).*
- Two ground beetles without common names (*Rhadine exilis* and *Rhadine infernalis*).
- Helotes mold beetle (*Batrisodes venyivi*).
- Cokendolpher Cave harvestman (*Texella cokendolpheri*),
- Robber Baron Cave meshweaver (*Cicurina baronia*).
- Madla Cave meshweaver (*Cicurina madla*).
- Bracken Bat Cave meshweaver (*Cicurina venii*).
- Government Canyon Bat Cave meshweaver (*Cicurina vespera*).
- Government Canyon Bat Cave spider (*Neoleptoneta microps*).
- Tooth Cave spider (*Neoleptoneta myopica*).
- Tooth Cave pseudoscorpion (*Tartarocreagris texana*).
- Bee Creek Cave harvestman (*Texella reddelli*).
- Kretschmarr Cave mold beetle (*Texamaurops reddelli*).
- Tooth Cave ground beetle (*Rhadine persephone*).
- Bone Cave harvestman (*Texella reyesi*).
- Coffin Cave mold beetle (*Batrisodes texanus*) .

Permit TE–170625

Applicant: Daniel Howard, Sioux Falls, South Dakota.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct presence/absence surveys for American burying beetle (*Nicrophorus americanus*) within Texas, South Dakota, Nebraska, Kansas, Arkansas, and Missouri.

Permit TE–150490

Applicant: New Mexico Energy Minerals and Natural Resources Department, Santa Fe, New Mexico.

Applicant requests a new permit for research and recovery purposes to collect voucher specimens and seeds from the following species within New Mexico:

- *Argemone pleiacantha* ssp. *pinnatisecta (*Sacramento prickly poppy).
- *Astragalus humillimus* (Mancos milk-vetch).
- *Cirsium vinaceum* (Sacramento Mountains thistle).
- *Coryphantha sneedii* var. *leei* (Lee pincushion cactus).
- *Coryphantha sneedii* var *sneedii* (Sneed pincushion cactus).

- *Echinocereus fendleri* var. *kuenzleri* (Kuenzler hedgehog cactus).
- *Erigeron rhizomatus* (Zuni fleabane).
- *Eriogonum gypsophilum* (Gypsum wild buckwheat).
- *Hedeoma todsenii* (Todsen's pennyroyal).
- *Helianthus paradoxus* (Pecos sunflower).
- *Ipomopsis sancti-spiritus* (Holy Ghost ipomopsis).
- *Pediocactus knowltonii* (Knowlton cactus).
- *Sclerocactus mesae-verdae* (Mesa Verde cactus) .

Permit TE–842565

Applicant: Cibola National Forest, Albuquerque, New Mexico.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct presence/absence surveys for southwestern willow flycatcher (*Empidonax traillii extimus*) within New Mexico.

Permit TE–46978A

Applicant: U.S. Department of Agriculture, North Central Plant Introduction Station, Ames, Iowa.

Applicant requests a new permit for research and recovery purposes to collect and distribute for reintroduction seeds from *Helianthus paradoxus* (Pecos sunflower) from plants in New Mexico.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: ;July 28, 2011.

Joy E. Nicholopoulos,

Regional Director, Southwest Region, Fish and Wildlife Service.

[FR Doc. 2011–19621 Filed 8–2–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORC00000.L58820000.DB0000. LXRSCC990000.252W; HAG 11–0297]

Notice of Public Meeting, Coos Bay District Resource Advisory Committee

AGENCY: Bureau of Land Management, Interior.

ACTION: Meeting Notice for the Coos Bay District Resource Advisory Committee.

SUMMARY: Pursuant to the Federal Land Policy and Management Act and the Federal Advisory Committee Act, the U.S. Department of the Interior, Bureau of Land Management (BLM) Coos Bay District Resource Advisory Committee (CBDRAC) will meet as indicated below:

DATES: The CBDRAC meeting will begin at 9 a.m. P.D.T. on August 19, 2011.

ADDRESSES: The CBDRAC will meet at the BLM Coos Bay District Office, 1300 Airport Lane, North Bend, Oregon 97459.

FOR FURTHER INFORMATION CONTACT: Megan Harper, BLM Coos Bay Public Affairs Specialist, 1300 Airport Lane, North Bend, OR 97459, (541) 751–4353, or e-mail *m1harper@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The meeting agenda includes opportunities for members to review and recommend projects for funding and other matters as may reasonably come before the council. The public is welcome to attend all portions of the meeting and may make oral comments to the Council at 11 a.m. on August 19, 2011. Those who verbally address the CBDRAC are asked to provide a *written* statement of their comments or presentation. Unless otherwise approved by the CBDRAC Chair, the public comment period will last no longer than 15 minutes, and each speaker may address the CBDRAC for a maximum of five minutes. If reasonable accommodation is required, please contact the BLM's Coos Bay District at (541) 756–0100 as soon as possible. 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, we cannot guarantee that we will be able to do so.

Mark E. Johnson,

District Manager, BLM Coos Bay District Office.

[FR Doc. 2011–19615 Filed 8–2–11; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUT92000 L13100000 FI0000 25–7A]

Notice of Proposed Class II Reinstatement of Terminated Oil and Gas Leases, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with Title IV of the Federal Oil and Gas Royalty Management Act (Pub. L. 97–451), Delta Petroleum Corporation and Wapiti Oil and Gas LLC timely filed a petition for reinstatement of oil and gas leases UTU–85226 and UTU–85230 lands in Uintah County, Utah, and it was accompanied by all required rentals and royalties accruing from February 1, 2011, the date of termination.

FOR FURTHER INFORMATION CONTACT: Kent Hoffman, Deputy State Director, Lands and Minerals, Utah State Office, Bureau of Land Management, 440 West 200 South, Salt Lake City, Utah 84145, phone (801) 539–4063.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lessee has agreed to new lease terms for rentals and royalties at rates of $10 per acre and 16-⅔%, respectively. The $500 administrative fee for both leases has been paid and the lessee has reimbursed the Bureau of Land Management for the cost of publishing this notice.

Having met all the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate the lease, effective February 1, 2011, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Jeff Rawson,

Associate State Director.

[FR Doc. 2011–19656 Filed 8–2–11; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT922200–11–L13100000–FI0000–P;NDM 95192]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease NDM 95192

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Per 30 U.S.C. 188(d), Sinclair Oil Corporation and Missouri River Royalty Corporation timely filed a petition for reinstatement of competitive oil and gas lease NDM 95192, McKenzie County, North Dakota. The lessees paid the required rental accruing from the date of termination.

No leases were issued that affect these lands. The lessees agree to new lease terms for rentals and royalties of $10 per acre and 16⅔ percent. The lessees paid the $500 administration fee for the reinstatement of the lease and $163 cost for publishing this Notice.

The lessees met the requirements for reinstatement of the lease per Sec. 31(d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188). We are proposing to reinstate the lease, effective the date of termination subject to:

- The original terms and conditions of the lease;
- The increased rental of $10 per acre;
- The increased royalty of 16⅔ percent; and
- The $163 cost of publishing this Notice.

FOR FURTHER INFORMATION CONTACT: Teri Bakken, Chief, Fluids Adjudication Section, Bureau of Land Management Montana State Office, 5001 Southgate Drive, Billings, Montana 59101–4669, 406–896–5091.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

Teri Bakken,

Chief, Fluids Adjudication Section.

[FR Doc. 2011–19653 Filed 8–2–11; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–0711–7949; 2280–665]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before July 9, 2011. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St. NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by August 18, 2011. 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, we cannot guarantee that we will be able to do so.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

CALIFORNIA

Placer County

Chapel of the Transfiguration, 855 W. Lake Blvd., Tahoe City, 11000534

KENTUCKY

Fayette County

Mathews, Courtney, House, 547 Breckinridge St., Lexington, 11000535

Graves County

Mayfield Electric and Water Systems, 301 E. Broadway, Mayfield, 11000536

Jefferson County

Conrad-Seaton House and Archeological Site, Address Restricted, Louisville, 11000537

Mason County

Cox Building, The, 2–8 E. 3rd St., Maysville, 11000538

McCracken County

Union Station School, 3138 Roosevelt St., Paducah, 11000539

Oldham County

Yew Dell Farm, 5800 N. Camden Ln., Crestwood, 11000540

MONTANA

Gallatin County

Lonesomehurst Cabin, Lonesomehurst Residential Residence Blk. A., Lot 1, West Yellowstone, 11000541

NEW YORK

Cortland County

Greenman, William J., House, 27 N. Church St., Cortland, 11000542

Otsego County

Tepee, The, 7632 US 20, Cherry Valley, 11000543

NORTH CAROLINA

Ashe County

Lansing Historic District, Roughly bounded by NC 194, G & A Sts., Lansing, 11000544

Beaufort County

Trinity Cemetery, NC 33, .07 mi. W. of jct. with NC 1157, Chocowinity, 11000545

VERMONT

Caledonia County

Darling Estate Historic District, Darling Hill Rd., Burke, 11000546

VIRGINIA

Accomack County

Hill, Captain Timothy, House, 5122 Main St., Chincoteague Island, 11000547

Arlington County

Highland Park-Overlee Knolls, (Historic Residential Suburbs in the United States, 1830–1960 MPS) Roughly bounded by 22nd St. N., N. Lexington St., 16th St. N., N. Longfellow St., McKinley Rd., I–66 & N. Quantico St., Arlington, 11000548

Richmond Independent city

Kent Road Village, (Federal Housing Administration-Insured Garden Apartments in Richmond, Virginia MPS) 920–924 N. Hamilton St. & 905–935 Kent Rd., Richmond (Independent City), 11000549

West Broad Street Industrial and Commercial Historic District, 1800–2100 blks. of Broad & Marshall Sts., bounded by Allison & Allen Sts., Richmond (Independent City), 11000550

Roanoke Independent city

Belmont Methodist-Episcopal Church, 806 Jamison Ave., Roanoke (Independent City), 11000551

Rockingham County

Haugh House, 6529 Port Republic Rd., Port Republic, 11000552

Shenandoah County

Mount Pleasant, 292 Hite Ln., Strasburg, 11000553

Toms Brook School, 3232 S. Main St., Toms Brook, 11000554

Waynesboro Independent city

Crompton-Shenandoah Plant, 200 W. 12th St., Waynesboro (Independent City), 11000555

WEST VIRGINIA

Hampshire County

Hickory Grove, Cty. rd. 8, 1 mi. S. of US 50, Romney, 11000556

Pendleton County

Pitsenbarger, Ananais, Farm, WV 23 approx. ¼ mi. S. of jct. with Cty. Rd. 23/1, Franklin, 11000557

Ritchie County

Harrisville Historic District, Roughly bounded by North, South, & Stout Sts. & Moats Ave., Harrisville, 11000558

WISCONSIN

Sauk County

Island Woolen Company Office Building, 900 2nd Ave., Baraboo, 11000559

[FR Doc. 2011–19572 Filed 8–2–11; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Time Extension To Accept Proposals, Select One Lessee, and Contract for Hydroelectric Power Development at the Pueblo Dam River Outlet, a Feature of the Fryingpan-Arkansas Project (Fry-Ark Project), Colorado

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of an extension for accepting proposals.

SUMMARY: The Bureau of Reclamation is extending the time period for accepting written proposals detailed in the Notice of Intent to Accept Proposals, Select One Lessee, and Contract for Hydroelectric Power Development at the Pueblo Dam River Outlet, a feature of the Fry-Ark Project, Colorado. This notice was originally published in the **Federal Register** on April 20, 2011 (76 FR 22143). The due date was originally to end on August 19, 2011.

DATES: A written proposal and seven copies must be submitted on or before 12 p.m. (MDT), on October 21, 2011. A proposal will be considered timely only if it is received in the office of the Lease of Power Privilege Coordinator by or before 12 p.m. (MDT) on the designated date. Interested entities are cautioned that delayed delivery to this office due to failures or misunderstandings of the entity and/or of mail, overnight, or courier services will not excuse lateness and, accordingly, are advised to provide sufficient time for delivery. Late proposals will not be considered.

ADDRESSES: Send written proposals and seven copies to Mr. George Gliko, Lease of Power Privilege Coordinator (GP–2200), Bureau of Reclamation, Great Plains Regional Office (GP–2200), P.O. Box 36900, Billings, MT 59107–6900.

FOR FURTHER INFORMATION CONTACT: Mr. George Gliko at (406) 247–7651.

SUPPLEMENTARY INFORMATION: All information contained in the original **Federal Register** notice remains in effect, except for the extension of time for accepting proposals.

Dated: July 13, 2011.

Michael J. Ryan,

Regional Director.

[FR Doc. 2011–19617 Filed 8–2–11; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 1029–0047

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request renewed approval for the collection of information for the permanent program performance standards-surface mining activities and underground mining activities.

DATES: Comments on the proposed information collection must be received by October 3, 2011, to be assured of consideration.

ADDRESSES: Comments may be mailed to John Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave, NW., Room 202–SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov.*

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection request contact John Trelease, at (202) 208–2783, or by e-mail at *jtrelease@osmre.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8 (d)]. This notice identifies an information collection that OSM will be submitting to OMB for renewed approval. This collection is contained in 30 CFR parts 816 and 817—Permanent Program Performance Standards-Surface and Underground Mining Activities. OSM will request a 3-year term of approval for this information collection activity.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control number for parts 816 and 817 is 1029–0047. Responses are required to obtain a benefit for this collection.

OSM has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on reestimates of burden or respondents and costs.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submission of the information collection request to OMB.

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, we cannot guarantee that we will be able to do so.

This notice provides the public with 60 days in which to comment on the following information collection activity:

Title: 30 CFR parts 816 and 817—Permanent Program Performance Standards—Surface and Underground Mining Activities.

OMB Control Number: 1029–0047.

SUMMARY: Sections 515 and 516 of the Surface Mining Control and Reclamation Act of 1977 provide that permittees conducting coal mining operations shall meet all applicable performance standards of the Act. The

information collected is used by the regulatory authority in monitoring and inspecting surface coal mining activities to ensure that they are conducted in compliance with the requirements of the Act.

Bureau Form Number: None.

Frequency of Collection: Once, on occasion, quarterly and annually.

Description of Respondents: Coal mining operators and State regulatory authorities.

Total Annual Responses: 361,504.

Total Annual Burden Hours: 1,812,498.

Total Annual Burden Cost: $9,506,784.

Dated: July 27, 2011.

John A. Trelease,

Acting Chief, Division of Regulatory Support.

[FR Doc. 2011–19389 Filed 8–2–11; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 1029–0039

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request renewed approval for the collection of information for Underground Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plans.

DATES: Comments on the proposed information collection must be received by October 3, 2011, to be assured of consideration.

ADDRESSES: Comments may be mailed to John Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Room 202–SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov.*

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection request contact John Trelease, at (202) 208–2783, or by e-mail at *jtrelease@osmre.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8 (d)]. This notice identifies an information collection that OSM will be submitting to OMB for renewed approval. OSM will seek a 3-year term of approval for the collection contained in 30 CFR part 784.

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 Part 784 is 1029–0039. Responses are required to obtain a benefit for this collection.

OSM has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on reestimates of burden or respondents and costs.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submission of the information collection request to OMB.

This notice provides the public with 60 days in which to comment on the following information collection activity:

Title: 30 CFR part 784—Underground Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plans.

OMB Control Number: 1029–0039.

Summary: Sections 507(b), 508(a) and 516(b) of Public Law 95–87 require underground coal mine permit applicants to submit an operations and reclamation plan and establish performance standards for the mining operation. Information submitted is used by the regulatory authority to determine if the applicant can comply with the applicable performance and environmental standards required by the law.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: 39 underground coal mining permit applicants and 24 State regulatory authorities.

Total Annual Responses: 1,141.

Total Annual Burden Hours: 13,903.

Total Annual Cost Burden: $537,105.

Dated: July 27, 2011.

John A. Trelease,

Acting Chief, Division of Regulatory Support.

[FR Doc. 2011–19386 Filed 8–2–11; 8:45 am]

BILLING CODE 4310–05–M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–747]

Certain Products Containing Interactive Program Guides and Parental Controls Technology; Notice of Commission Decision Not To Review an Initial Determination Terminating the Investigation on the Basis of the Parties' Settlement

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (''ALJ'') initial determination (''ID'') (Order No. 18) granting a joint motion to terminate the investigation based on settlement.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–2532. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on November 24, 2010, based on a complaint filed by Rovi Corp. (f/k/a Macrovision Solutions Corp.) of Santa Clara, California; its wholly-owned subsidiary Rovi Guides, Inc. (f/k/a Gemstar-TV Guide International, Inc.) (''Rovi Guides'') of Santa Clara, California; and Rovi Guides' wholly-owned subsidiaries United Video Properties of Santa Clara, California,

and Index Systems, Inc., of the British Virgin Islands (collectively, ''Rovi''). 75 FR 71737 (November 24, 2010). The complaint named as respondents Toshiba Corp. of Japan and its subsidiaries Toshiba America, Inc. of New York, New York; Toshiba America Consumer Products, LLC of Wayne, New Jersey; and Toshiba America Information Systems, Inc. of Irvine, California (collectively, ''Toshiba''). The complaint alleged a violation of section 337 in the importation, sale for importation, and sale within the United States after importation of certain products containing interactive program guide and parental controls technology by reason of the infringement of certain claims of U.S. Patent Nos. 6,305,016; 6,020,929; and 6,701,523.

On July 6, 2011, Rovi and Toshiba moved to terminate the investigation based on a license agreement that settled the parties' dispute. On July 11, 2011, the ALJ issued the subject ID, granting the motion. Order No. 18.

No petitions for review of the ID were filed. The Commission has determined not to review the ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: July 28, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–19571 Filed 8–2–11; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act

Under 28 CFR 50.7, notice is hereby given that on July 28, 2011, a proposed consent decree with defendant Wilko Paint, Inc., was lodged in the civil action entitled *United States* v. *Wilko Paint, Inc.,* No. 11–cv–01205–EFM–GLR, in the United States District Court for the District of Kansas.

In this action the United States is seeking to recover costs under the Comprehensive Environmental Response, Compensation and Liability Act (''CERCLA''), which were incurred in response to releases of hazardous substances at the 57th and North Broadway Superfund Site (''the Site''), in Wichita, Kansas. The proposed consent decree will resolve the United States' claim against the defendant under Section 107 of CERCLA, 42 U.S.C. 9607, for the Site. Under the terms of the proposed consent decree, defendant Wilko Paint will make a cash payment of $350,000 to the United States, which is based on Wilko's ability to pay a financial judgment against it, and will give the United States a share of any future insurance recovery related to the claim. In return, the United States will grant the defendant a covenant not to sue under CERCLA with respect to the Site. For thirty (30) days after the date of this publication, the Department of Justice will receive comments relating to the proposed consent decree. Comments may be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or submitted by email to *pubcomment-ees.enrd@usdoj.gov,* and should refer to the proposed consent decree in *United States* v. *Wilko Paint, Inc.* (D. Kan.), D.J. Ref. 90–11–3–1737/2.

The proposed consent decree may be examined at the office of the United States Attorney, 1200 Epic Center, 301 N. Main Street, Wichita, Kansas 67212. During the public comment period, the Consent Decree may be examined on the Justice Department's Web site at *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed consent decree may be obtained by mailing a request to the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611. When requesting a copy by mail, please enclose a check payable to the U.S. Treasury in the amount of $6.50 (25 cents per page reproduction cost). A copy may also be obtained by e-mailing or faxing a request to Tonia Fleetwood, *tonia.fleetwood@usdoj.gov,* fax number (202) 514–0097, phone confirmation number (202) 514–1547, and mailing a check to the Consent Decree Library at the stated address.

Robert E. Maher, Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–19589 Filed 8–2–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on July 29, 2011, a proposed Consent Decree (''Consent Decree'') in *United States* v. *The Dow Chemical Company,* Civil Action No. 1:11–cv–13330–TLL–CEB, was lodged with the United States District Court for the Eastern District of Michigan.

In this action, the United States sought penalties from The Dow Chemical Company (''Dow'') for alleged violations of Section 112 of the Clean Air Act, 42 U.S.C. 7412, Section 301(a) of the Clean Water Act, 42 U.S.C. 1311(a), and Section 3005(a) of the Resource Conservation and Recovery Act, 42 U.S.C. 6925(a), at Dow's chemical manufacturing and research facility in Midland, Michigan. Under the Consent Decree, Dow will implement an Enhanced Leak Detection and Repair (''LDAR'') Program which imposes leak monitoring and repair requirements more stringent than existing LDAR regulations, including more frequent monitoring, more stringent repair practices, and the use of new, low-emissions valve technology. Dow also will pay a civil penalty of $2.5 million.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *The Dow Chemical Company,* D.J. Ref. No. 90–5–2–1–08935.

During the public comment period, the Consent Decree may be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree 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 number (202) 514–0097, phone confirmation number (202) 514–1547. If requesting a copy from the Consent Decree Library by mail, please enclose a check in the amount of $19.00 (25 cents per page reproduction cost) payable to the U.S. Treasury, or, if requesting by email or fax, forward a check in that amount to the Consent

Decree Library at the address given above.

Maureen M. Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–19657 Filed 8–2–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Green Seal, Inc.

Notice is hereby given that, on June 28, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Green Seal, Inc. (''Green Seal'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Green Seal has issued a new standard for personal care and cosmetic products.

On January 26, 2011, Green Seal filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 7, 2011 (76 FR 12370).

Patricia A. Brink,

Director of Civil Enforcement Antitrust Division.

[FR Doc. 2011–19443 Filed 8–2–11; 8:45 am]

BILLING CODE 4410–41–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 07–43]

Terese, Inc., D/B/A Peach Orchard Drugs; Admonition of Registrant

On July 25, 2007, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Terese, Inc., d/b/a/Peach Orchard Drugs (Respondent), of Augusta, Georgia. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, which authorizes it to dispense controlled substances as a retail pharmacy, and the denial of any pending applications to renew or modify its registration, on the ground that its ''continued registration is inconsistent with the public interest.'' ALJ Ex. 1, at 1 (citing 21 U.S.C. 823(f) & 824(a)(4)).

The Order specifically alleged that Ms. Terese Fordham, the president of Terese, Inc., had applied for and received a DEA Certificate of Registration as a retail pharmacy. *Id.* The Order alleged that Ms. Fordham was married to John Duncan Fordham, who was the pharmacist-in-charge and owner of Duncan Drugs, which had been located at the same address as Respondent. *Id.* The Order further alleged that on May 5, 2005, both Mr. Fordham and Duncan Drugs were convicted of violating 18 U.S.C. 1347, and that on May 25, 2005, Mr. Fordham was ''excluded from the Medicaid program.'' *Id.* The Order then alleged that Mr. Fordham ''violated his conditions of release by unlawfully dispensing Medicaid controlled substances prescriptions by use of another provider's identification number,'' that Fordham was sentenced to 52 months imprisonment, and that Duncan Drugs ''was forfeited to the United States.'' *Id.*

Next, the Show Cause Order alleged that Ms. Fordham had falsified Respondent's application to enroll in Medicaid, and that on December 2, 2006, the Georgia Department of Community Health had denied Respondent's Medicaid application. *Id.* at 2. The Order then alleged that at a state hearing, ''Ms. Fordham and [Respondent's] pharmacist-in-charge declined to present evidence of corporate ownership information to the State.'' *Id.*

Finally, the Show Cause Order alleged that ''DEA considers *for purposes of the Controlled Substances Act* that a retail pharmacy only operates through its officers and agents'' and that ''[t]he registration of a pharmacy may be revoked as the result of the unlawful activity of its owners, majority shareholder, officer, managing pharmacist or other key employee.'' *Id.* (emphasis added). The Order then concluded by alleging that ''[i]n this matter, the restoration of the pharmacy operations to the spouse of the prior owner/operator is not a bona fide transaction but more of a device to retain a DEA registration with no change of control or financial interest by the previous owner who had engaged in misconduct as a registrant.'' *Id.*

Respondent timely requested a hearing on the allegations, ALJ Ex. 2, and the matter was placed on the docket of the Agency's Administrative Law Judges (ALJs). Thereafter, on April 15, 2008, an ALJ conducted a hearing in Charleston, South Carolina, at which both parties called witnesses to testify and introduced documentary evidence. ALJ at 2.

On May 13, 2009, the ALJ issued her recommended decision. Therein, the ALJ rejected the Government's principal theories that Respondent is the alter ego of Duncan Drugs and that the creation of the pharmacy is a sham transaction which was carried out to avoid the consequences of Duncan Drugs' loss of its registration. ALJ at 20–22. While the ALJ also found that Respondent had committed three recordkeeping violations (it failed to note the date of receipt of controlled-substance orders on DEA Form 222, had failed to record an initial inventory, and had not executed a power of attorney authorizing an employee to order Schedule II controlled substances), she found Respondent's attempt to remedy the violations to be ''sincere'' and that the violations ''would not, standing alone, justify revoking its registration.'' *Id.* at 22–24 (citing 21 CFR 1305.13(e), 1304.11(b), 1305.04, and 1305.05(a)). The ALJ also noted that there was ''no evidence that there has been any diversion of controlled substances from Respondent.'' *Id.* at 22. The ALJ thus recommended that Respondent's registration ''be continued, subject to the condition that Mr. Fordham shall have no involvement with Respondent in any capacity, including ownership, management, or as an employee, and shall exercise no influence or control, direct or indirect, over the operation of Respondent.'' *Id.* at 27.

Neither party filed exceptions to the ALJ's decision. Thereafter, the record was forwarded to my office for final agency action.

During the initial course of my review, I noted that the record indicated that two proceedings were then pending which appeared to be material to the allegations: the divorce proceeding filed by Ms. Fordham and Respondent's appeal of the State's denial of its application to enroll in Medicaid. Accordingly, I ordered that Respondent address the status of these proceedings.

In responding to my order, Respondent noted that Mrs. and Mr. Fordham had voluntarily dismissed without prejudice their claims in the divorce proceeding. Respondent further noted that the Georgia Department of Community Health was now appealing the order of the Superior Court of Richmond County which vacated the Department's Decision.

Having considered the record as a whole, I agree with the ALJ's conclusion that the three recordkeeping violations

are not sufficient to justify revoking Respondent's registration. As for the Government's contention that Respondent's registration may be revoked ''on public interest grounds'' because Duncan Drugs and Duncan Fordham were convicted of health care fraud in violation of 18 U.S.C. 1347 and Respondent's application to participate in Medicaid was denied by the State of Georgia, Gov. Br. at 9 (citing 21 U.S.C. 824(a)(4)), based on section 824's text, structure, and history, I conclude that the Agency's authority under section 824(a)(4) does not encompass these circumstances. Because there is no evidence in this record that Duncan Drugs or Duncan Fordham diverted controlled substances or otherwise violated either the Controlled Substances Act or DEA regulations, I also conclude that the Government's alter ego theory does not apply. I make the following the findings.

Findings

Respondent is a Georgia corporation which operates a retail pharmacy at 2529 Peach Orchard Road, Augusta, Georgia. GXs 3 & 5. Respondent's President is Terese Fordham; Ms. Fordham also owns the vast majority of the Respondent's shares. GX 5, at 2; Tr. 34–35, 37, 110.

In June 2002, Ms. Fordham married John Duncan Fordham. Tr. 115. Mr. Fordham was previously a licensed pharmacist who owned and operated Duncan Drugs, a pharmacy which was located at the same address. Tr. 21; GXs 13 & 14.

On May 25, 2004, both John Duncan Fordham and Fordham, Inc., the corporation which operated Duncan Drugs, were indicted by a Federal grand jury which charged Fordham and his corporation (along with others) with having committed health care fraud in violation of 18 U.S.C. § 1347. GX 16. On May 5, 2005, both John Duncan Fordham and Fordham, Inc., were convicted of the charge. GXs 13 & 16. Thereafter, on May 25, 2005, the Georgia Department of Community Health [hereinafter, DCH] terminated Duncan Drugs' enrollment as a Medicaid provider. GX 13.

On September 15, 2005, the District Court sentenced Fordham to 52 months imprisonment to be followed by three years of supervised release; the Court also imposed several ''special conditions of supervision'' to include, *inter alia,* that Fordham surrender ''any license issued by any state or Federal authority to dispense drugs or pharmaceuticals'' which were ''hereby revoked,'' and that ''he is not to be employed with or without compensation in any pharmacy.'' GX 15, at 1–5.[1] Moreover, on the same day, the Court sentenced Fordham, Inc., to five years of probation. GX 14, at 2. On September 23, 2005, both judgments were entered.[2]

Several months later, Duncan Fordham commenced serving his sentence. In the meantime, Ms. Fordham had contacted David Scharff, a licensed pharmacist, who had been the Director of Pharmacy at Georgia Regional Hospital for more than thirty years. Tr. 72. Ms. Fordham told Mr. Scharff that she intended to reopen the pharmacy to support herself and asked if he would become the pharmacist in charge. *Id.* at 73. Mr. Scharff met with the Fordhams and discussed various issues related to reopening the pharmacy; Scharff agreed to become Respondent's pharmacist-in-charge. *Id.* at 74.

Thereafter, on November 3, 2005, Ms. Fordham submitted an application on Respondent's behalf for a DEA registration as a retail pharmacy. GX 2. Moreover, on November 16, Ms. Fordham filed Respondent's application for a pharmacy license with the Georgia State Board of Pharmacy. GX 5, at 1–3. On January 31, 2006, the State issued a retail pharmacy license to Respondent, GX 10, and on February 10, 2006, DEA issued a registration to Respondent.[3] GX 2, at 1.

On February 13, 2006, Respondent submitted an application to the DCH, which was completed and signed by Mr. Scharff, to become an enrolled Medicaid provider. GX 6, at 5. On the application, Respondent was required to answer a series of questions regarding whether it, or various persons associated with it, had been excluded or sanctioned by either a Federal or State health care program. *Id.* at 4. Respondent answered ''no'' to all of the questions including the third one, which asked: ''Has any family or household member(s) of the applicant who has ownership or control interest in the applicant ever been convicted * * * for any health related crimes or misconduct, or excluded from any Federal or State health care program due to fraud, obstruction of an investigation, a controlled substance violation or any other crime or misconduct?'' *Id.*[4]

Based on this answer, on July 31, 2006, the DCH denied Respondent's application on the grounds that its answer to question 3 was a false representation of a material fact and that Respondent ''is functionally the alter ego of Duncan Drugs which has previously been excluded from the Medicaid program.'' GX 7, at 1. Respondent appealed and a hearing was held before a DCH Hearing Officer.

On December 22, 2006, the Hearing Officer issued his decision. Therein, the Hearing Officer found that Respondent's answer to question 3 was ''an untruthful statement and a false representation of a material fact'' because Respondent had failed to disclose Duncan Fordham's conviction. GX 8, at 10. He also found that Respondent had failed to respond to a DCH subpoena. *Id.* at 11. However, he declined to reach the issue of whether Respondent ''is the 'alter ego' to Duncan Fordham and/or Duncan Drugs.'' *Id.* The Hearing Officer thus denied Respondent's appeal.

Respondent then appealed to the Superior Court for Richmond County, which heard the matter on January 12, 2007. On August 4, 2009, the court concluded that ''the evidence considered in the [DCH] hearing * * * was incomplete as the answer to Question 3 * * * on the application was not provided by the petitioner as a blank remained.'' Order on Petitioner's Appeal at 1, *Tereses* [sic], *Inc.,* v. *Department of Community Health,* No 2007RCCV0027 (Super. Ct. Ga., Aug. 4, 2009). The court also noted that Respondent ''had not yet furnished a Georgia Medicaid Disclosure of

[1] The District Court also ordered Fordham and Fordham, Inc., to pay an assessment of $400 and restitution of more than $1,000,000; the Court also ordered forfeited $500,000 to the United States. GX 15, at 5–6.

[2] The DI testified that while Mr. Fordham was released on bond, he attempted to sell the pharmacy although the indictment had included a count for forfeiture. Tr. 22–23. The DI also testified that following Duncan Drugs' exclusion from Medicaid, Fordham filled prescriptions for Medicaid patients and billed for the prescriptions by using another pharmacy's enrollment. *Id.* at 23.

There is no evidence, however, that the DI was personally involved in investigating either incident. Moreover, while her testimony is consistent with the findings made by a DCH Hearing Officer in Respondent's appeal of the denial of its application to be an authorized Medicaid Provider, *see* GX 8, at 2–3, that decision was subsequently vacated by the Superior Court of Richmond County, which itself is now on appeal to the Georgia Court of Appeals. Accordingly, the State Hearing Officer's findings are not entitled to preclusive effect.

[3] Respondent's DEA registration authorizes it to dispense controlled substances in schedules II through V; while the registration was to expire on March 31, 2009, on February 2, 2009, Respondent filed a renewal application. Because this application was filed more than 45 days before the expiration date as required by the Agency's rule, Respondent's registration has remained in effect pending the issuance of this Decision and Final Order. *See* 5 U.S.C. 558(c); 21 CFR 1301.36(i).

[4] Mr. Scharff testified that he answered ''no'' because he was ''thinking [of himself] as the pharmacist in charge and not anybody else.'' Tr. 78. He further explained that in South Carolina, the form ''specifically says, and any other member of the corporation,'' and that the Georgia form ''makes it sound like it's directed straight towards me.'' *Id.* at 78–79.

Ownership and Control Interest form.'' *Id.* Concluding that ''in the interest of justice and completeness, * * * the ALJ should have directed that the form be completed by the petitioner before ruling on the issue as presented,'' the court remanded the case ''for completion of the record'' and instructed the Hearing Officer to ''direct petitioner to complete the form.'' *Id.*

On September 8, 2009, the State filed an Application for Discretionary Appeal in the Georgia Court of Appeals. Notice of Appeal at 1. On October 1, the court granted the application. *Georgia Dep't of Community Health* v. *Terese's* [sic], *Inc.,* (Ga. App. Oct. 1, 2009) (order granting application for discretionary review). However, on June 24, 2010, the court dismissed the State's appeal for lack of jurisdiction. Order at 3, *DCH* v.*Terese's,* No. A10A0658s (order dismissing appeal).[5]

The DEA Investigation

A DEA Diversion Investigator (DI) testified that in May 2005, a person came into the DEA Augusta, Georgia office, and stated that ''he was able to go into Duncan Drugs and received drugs upon request and [that] the pharmacy * * * would apply it to DEA Registrations of physicians that never saw the individual.'' Tr. 19–20. The DI then contacted the U.S. Attorney's Office and was told that ''Duncan Drugs was under indictment for health care fraud.'' *Id.* at 20.

The DI further testified that she subsequently learned that Fordham ''supposedly * * * was involved with a contract'' which had ''an incentive clause'' under which ''he provided controlled substances or drugs to a mental health center'' and ''received millions of dollars, that they found * * * was fraudulent.'' *Id.* at 21–22. The DI then testified that Fordham was convicted of health care fraud. *Id.* at 22. The record contains no further evidence substantiating the allegation that Fordham had committed violations of the Controlled Substances Act (CSA).[6]

On some date which is not clear from the record, the DI learned from a Special Agent with the DCH that ''Duncan Drugs had opened up again.'' *Id.* at 31. She also learned that Respondent's application for a DEA registration had been approved and ''was surprised because'' she viewed Terese Fordham as ''an extension of Duncan Drugs.'' *Id.* at 27.

Thereafter, on April 21, 2006, the DI (along with the DCH Special Agent) met with Mr. Scharff at his residence to discuss Respondent's ''management structure.'' *Id.* at 28–29. According to the DI, Scharff stated that he owned 10 percent of the pharmacy (although he had not invested any money in Terese, Inc.) and Ms. Fordham owned 80 percent; Mr. Scharff was unsure as to who owned the remaining 10 percent. *Id.* at 34–35.

On May 4, 2006, the DI and the DCH Special Agent went to Respondent to interview Ms. Fordham regarding its management structure. *Id.* at 35–36. Because Ms. Fordham was not present upon the DI's arrival, the DI proceeded to conduct an inspection during which she reviewed Respondent's recordkeeping. *Id.* at 36. The DI found that Respondent had not been completing the right-hand side of the DEA Forms 222 (which are used to order schedule II controlled substances) to indicate when it had received the drugs. *Id.* The DI further found that Respondent did not have an initial inventory of its controlled substances, which it is required to make a record of even if no drugs are initially on hand.[7] *Id.* Finally, Respondent did not have a power of attorney form indicating who was authorized to order schedule II controlled substances on its behalf. *Id.* Regarding these violations, Mr. Scharff testified that he was ''derelict'' in failing to see that the order forms were signed and that upon being informed that this needed to be done, he ''immediately began doing it.'' *Id.* at 79–80.

Upon Ms. Fordham's arrival at the pharmacy, the DI questioned her regarding Respondent's management structure and whether Duncan Fordham was involved. *Id.* at 37, 40–41. Ms. Fordham stated that she owned 80 percent of the pharmacy, her daughter owned 10 percent and Mr. Scharff owned the remaining 10 percent. *Id.* at 37–38. Ms. Fordham stated that she had put up all of the money for the pharmacy.[8] *Id.* at 38. According to the DI, Ms. Fordham stated that she had opened the pharmacy because she was getting phone calls from Duncan Drugs' former customers and felt ''an obligation'' to its former employees ''to keep their jobs.'' *Id.* Moreover, in her testimony, Ms. Fordham stated that her husband had nothing to do with the business, Tr. 125, and there is no evidence in the record establishing that he had a financial or controlling interest in the pharmacy.

Discussion

The Government argues that ''there is a myriad of prior agency decisions to support a revocation on the grounds that the new registrant was intended to operate so as to avoid the consequence of the surrender of the previous family business.'' Gov. Br. 8. It contends that ''[u]nder 21 U.S.C. § 824(a)(4), the Deputy Administrator may revoke Respondent's registration on public interest grounds'' and that, in this matter, ''all of the five factors under 21 U.S.C. § 823(f) are relevant to the determination of whether Respondent's registration would be in the public interest.'' *Id.* at 9. The Government further maintains that its ''exhibits and testimony support by a preponderance of the evidence a finding that the Government has presented a case for revocation of [Respondent's] registration on public interest grounds.'' *Id.* at 11.

As noted above, the Government seeks the revocation of Respondent's DEA registration on public interest grounds because Ms. Fordham's spouse has been convicted of health care fraud; the Government also cites as a basis for revocation that Ms. Fordham falsified Respondent's application to become a Medicaid provider and declined to present evidence to the State as to the ownership of Respondent, thus resulting in the State's denial of its application. ALJ Ex. at 2. As explained below, the Government's assertion as to the scope of the Agency's authority under section 824(a)(4) is irreconcilable with the text, structure, and history of section 824, as well as 42 U.S.C. 1320a–7, which, because it is specifically referenced in section 824(a)(5), is also relevant here.

[5] On October 25, 2010, Respondent submitted a document establishing that it and the DCH had settled their dispute and that the DCH had granted it a Medicaid Provider number. However, there is no evidence that the document was served on the Government. Accordingly, I have not considered the document. Moreover, among the legal theories advanced by the Government is that the ''[p]redecessor pharmacy violated [s]tate laws involving Medicare [f]raud,'' and that this provides a basis to revoke Respondent's registration under the public interest standard. Gov. Br. at 10–11. Accordingly, the settlement does not moot the case.

[6] The DI also testified that while Duncan Fordham was out on bond, he used the Medicaid Provider number of another pharmacist to fill prescriptions that were dispensed by Duncan Drugs. Tr. 23. Beyond the fact that the DI's testimony does not appear to have been based on personal knowledge, here again, there is no evidence that any of the prescriptions violated the CSA.

[7] The DI explained that under the regulation, even if no drugs are on hand initially, an inventory indicating that there are no drugs is still required. Tr. 36; *see* 21 CFR 1304.11(b) (''In the event a person commences business with no controlled substances on hand, he/she shall record this fact as the initial inventory.'').

[8] Ms. Fordham further testified that she obtained a loan for $280,000 from Smith Drug Company, a distributor, and took cash advances on her credit cards. Tr. 120–21. Ms. Fordham also acknowledged that she is not a licensed pharmacist and had never run a pharmacy. *Id.* at 131. However, she had worked as an assistant manager of a bank and owned a business. *Id.*

Notably, the Government does not address the applicability of section 824(a)(5) and 42 U.S.C. 1320a–7 in its brief, and its interpretation would render section 824(a)(5) meaningless.

The starting point in any case of statutory construction is the language of the statute itself. *See, e.g., Desert Palace, Inc.,* v. *Costa,* 539 U.S. 90, 98 (2003). In section 824(a), Congress enumerated the five grounds on which the Agency may suspend or revoke a registration issued under the Controlled Substances Act. The statute provides in relevant part:

> A registration pursuant to section 823 of this title to manufacture, distribute, or dispense a controlled substance or a list I chemical may be suspended or revoked by the Attorney General upon a finding that the registrant—
>
> (1) has materially falsified any application filed pursuant to or required by this subchapter or subchapter II of this chapter;
>
> (2) has been convicted of a felony under this subchapter or subchapter II of this chapter or any other law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance or a list I chemical;
>
> (3) has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances or list I chemicals or has had the suspension, revocation, or denial of his registration recommended by competent State authority;
>
> (4) has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section; or
>
> (5) has been excluded (or directed to be excluded) from participation in a program pursuant to section 1320a–7(a) of Title 42.

21 U.S.C. 824(a).

As section 824(a)(4) makes clear, the scope of the Agency's authority to revoke on public interest grounds is defined by the factors set forth in 21 U.S.C. 823. In the case of a pharmacy, Congress directed that the following factors be considered ''[i]n determining the public interest'':

> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
>
> (2) The applicant's experience in dispensing * * * controlled substances.
>
> (3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
>
> (4) Compliance with applicable State, Federal or local laws relating to controlled substances.
>
> (5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f).

Contrary to the Government's assertions that all five factors are relevant here, none of its principal allegations fall within any of the factors. Gov. Br. 9. The Government cites no authority for its contention that the State's denial of Respondent's application to participate in Medicaid constitutes action by a ''State licensing board or professional disciplinary authority.'' 21 U.S.C. 823(f)(1), Gov. Br. 9. Moreover, while the Government cites the conviction of Duncan Drugs as ground to revoke under factor three, neither that entity, nor Mr. Fordham, was convicted of an offense related to the ''distribution[] or dispensing of controlled substances.'' 21 U.S.C. 823(f)(3). As for factors two and four, while the Government elicited testimony that an informant had told a DI that Duncan Drugs was filling unlawful prescriptions, this evidence does not rise to the level of substantial evidence,[9] and the only allegations proven on this record which are relevant in assessing Respondent's experience in dispensing controlled substances, *id.* § 823(f)(2), and its compliance with applicable laws related to controlled substances, *id.* § 823(f)(4), involve three minor recordkeeping violations. Thus, in determining whether Respondent's registration is ''inconsistent with the public interest,'' 21 U.S.C. 824(a), the only question remaining is whether the Government's allegations constitute ''[s]uch other conduct which may threaten public health and safety.'' *Id.* § 823(f)(5). I conclude that they do not.

As noted above, in section 824(a)(5), Congress provided the Agency with authority to revoke a registration where a registrant has been excluded (or directed to be excluded) from participation in a program pursuant to section 1320a–7(a) of Title 42. Under 42 U.S.C. 1320a–7, the Secretary of the Department of Health and Human Services has been granted the authority to exclude an individual or entity ''from participation in any Federal health care program.'' The statute provides for two distinct categories of exclusion: (1) Those which are ''mandatory,'' and (2) those which are ''permissive.'' *Compare id.* § 1320a–7(a) (''[t]he Secretary shall exclude''), *with id.* § 1320a–7(b) (''[t]he Secretary may exclude''). *See also* S. Rep. No. 100–109, at 4, *reprinted in* 1987 U.S.C.C.A.N. 682, 685 (''The bill identifies a number of acts for which exclusion from Medicare and State health care programs is appropriate. * * * The bill divides these actions into two broad categories: those for which exclusion is mandatory, and those for which it is discretionary with the Secretary.'').

The Secretary's ''mandatory exclusion'' authority is triggered, however, only when an ''individual or entity'' has been convicted of certain criminal offenses. 42 U.S.C. 1320a–7(a). Most importantly, Congress has limited this authority to four categories of offenses: (1) ''[c]onviction of program-related crimes,'' which is defined as ''a criminal offense related to the delivery of an item or service under * * * 42 U.S.C. §§ 1395 et seq. * * * or under any State health care program''; (2) ''[c]onviction relating to patient abuse,'' which is defined as ''a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service''; (3) ''[f]elony conviction relating to health care fraud,'' which is defined as a conviction ''under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in * * * [subparagraph (a)(1)]) operated by or financed * * * by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct''; and (4) ''[f]elony conviction relating to controlled substance,'' which is defined as a conviction, ''under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.'' *Id.*

By contrast, subsection b grants the Secretary ''permissive exclusion'' authority on fifteen different grounds. *Id.* § 1320a–7(b). Of potential relevance here, the Secretary's ''permissive exclusion'' authority includes where ''an individual or entity * * * has been suspended or excluded from participation under * * * any Federal program * * * involving the provision

[9] This evidence was limited to the testimony of a DI that in 2005, an informant told her that ''he was able to go into Duncan Drugs and received drugs upon request and [that] the pharmacy * * * would apply it to DEA Registration of physicians that never saw the individual.'' Tr. 19–20. The DI did not testify as to any investigation she conducted to corroborate the informant's story. This testimony thus creates only a suspicion that Duncan Drugs and/or Duncan Fordham were diverting controlled substances and does not rise to the level of substantial evidence. *See NLRB* v. *Columbia Enameling & Stamping Co., Inc.,* 306 U.S. 292, 300 (1939) (''Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established.'').

To make clear, had the evidence established that Duncan Fordham or Duncan Drugs violated the CSA or state controlled substance laws, the Agency case law on piercing the corporate veil would authorize the revocation of Respondent's registration.

of health care, or * * * a State health care program, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity,'' *Id.* § 1320a–7(b)(5), where an entity is ''controlled by a sanctioned individual,'' *Id.* § 1320a–7(b)(8),[10] and where an individual or entity has failed to ''fully and accurately make any disclosure required by [42 U.S.C. §§ 1320a–3, 1320a–3a, or 1320a–5].'' *Id.* § 1320a–7(b)(15).

As the foregoing demonstrates, in granting the Secretary authority to exclude providers from participating in Federal health care programs, Congress created two distinct categories of exclusion. When, however, in 1987 Congress amended section 304 of the Controlled Substances Act to authorize the Attorney General to suspend or revoke a registration based on a provider's having ''been excluded (or directed to be excluded) from participation in'' a Federal health care program, it provided that the exclusion must be ''pursuant to section 1320a–7(a).'' 21 U.S.C. 824(a)(5).

By its plain terms, section 824(a)(5) therefore limits the Attorney General's authority to revoke a registration based on an entity's exclusion from any Federal health care program to only those instances in which an individual or entity has been mandatorily excluded. *See* 42 U.S.C. 1320a–7(a). If Congress had intended that revocation of a DEA registration was warranted whenever a provider has been excluded from participation in a Federal health care program, it could have easily done so in the statutory text.

It is undisputed that both Duncan Fordham and the corporate entity, Fordham, Inc., were convicted of healthcare fraud in violation of 18 U.S.C. 1347. GXs 14 & 15. While Fordham and his corporation were terminated as a Medicaid provider by the Georgia DCH (and not the Secretary), it is clear that his and his corporation's respective convictions constitute a ''[f]elony conviction relating to health care fraud'' and fall within the Secretary's ''mandatory exclusion'' authority. 42 U.S.C. 1320a–7(a)(3).

It is also clear, however, that neither Terese Fordham nor Respondent has been convicted of any offense, let alone one which would subject them to the Secretary's mandatory exclusion authority. *See* 42 U.S.C. 1320a–7(a). Moreover, none of the other grounds which were alleged by the State for excluding Respondent from participation in Medicaid (providing materially false information, being the alter ego of Duncan Drugs, and failing to provide documentation requested by DCH, *see* GX 7, at 1), subjected it to mandatory exclusion by the Secretary. *See Id.* Indeed, even the allegation that Respondent is the alter ego of Duncan Drugs (and is controlled by Duncan Fordham) appears to have been specifically addressed by Congress in section 1320a–7(b)(8), which applies to ''[e]ntities controlled by a sanctioned individual.'' *Id.* § 1320a–7(b)(8).

However, as explained above, this ground falls within the Secretary's ''permissive exclusion'' authority and, as such, is outside of the scope of the Attorney General's authority under subsection 824(a)(5). 21 U.S.C. 824(a)(5). Moreover, the Government does not cite any decision of the Secretary holding that an entity that is deemed to be the alter ego of an entity which has been convicted of an offense subject to the ''mandatory exclusion'' authority is likewise subject to that authority.

The Government's brief does not address the applicability of subsection 824(a)(5) to its contention. However, in subsection 824(a)(5), Congress specifically addressed the circumstances in which an exclusion by the Secretary is grounds for the revocation of a DEA registration. As the Supreme Court has long explained, ''[a] specific provision controls over one of more general application.'' *Gozlon-Peretz* v. *United States,* 498 U.S. 395, 407 (1991) (citing *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.,* 482 U.S. 437, 445 (1987)); *see also Bloate* v. *United States,* 130 S.Ct. 1345, 1354 (2010) (quoting *D. Ginsberg & Sons, Inc.* v. *Popkin,* 285 U.S. 204, 208 (1932) (''General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.'')). This rule of construction provides reason alone to reject the Government's assertion.

The Government's construction fails for other reasons. First, it ignores the history of the CSA. As originally enacted, the CSA limited the Attorney General's authority to revoke a registration to three circumstances: (1) Where a registrant had materially falsified an application for registration under either subchapter I (the CSA) or subchapter II (the Import and Export provisions, 21 U.S.C. 951–971); (2) where a registrant had been convicted of a felony under either subchapter I or II, ''or of any State [or other Federal law], relating to any substance defined in this title as a controlled substance''; and (3) where a registrant no longer has authority under State law to manufacture, distribute or dispense controlled substances. Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91–515, § 304(a), 84 Stat. 1437, 1460 (1970) (codified as amended at 21 U.S.C. 824(a)).

Congress did not grant the Attorney General authority to revoke on public interest grounds until 1984, when it enacted the Drug Enforcement Amendments to the Comprehensive Crime Control Act of 1984. *See* Public Law 98–473, § 512, 98 Stat.1838, 2073 (1984). Congress then explained that the ''[i]mproper diversion of controlled substances by practitioners is one of the most serious aspects of the drug abuse problem. However, effective Federal action against practitioners has been severely inhibited by the limited authority in current law to deny or revoke practitioner registrations.'' H.R. Rep. No. 98–1030, at 266 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3448. Continuing, the House Report explained that:

> because of a variety of legal, organizational, and resource problems, many States are unable to take effective or prompt action against violating registrants. Since State revocation of a practitioner's license or registration is a primary basis on which Federal registration may be revoked or denied, problems at the State regulatory level have had a severe adverse impact on Federal anti-diversion efforts. The criteria of prior felony drug conviction for denial or revocation of registration has proven too limited in certain cases as well, for many violations involving controlled substances which are prescription drugs are not punishable as felonies under State law. Moreover, delays in obtaining conviction allow practitioners to continue to dispense drugs with a high abuse potential even where there is strong evidence that they have

[10] This paragraph provides that:

Any entity with respect to which the Secretary determines that a person—

(A)(i) who has a direct or indirect ownership or control interest of 5 percent or more in the entity or with an ownership or control interest (as defined in [42 U.S.C. 1320(a)(3)]) in that entity,

(ii) who is an officer, director, agent, or managing employee (as defined in [42 U.S.C. 1320a–5(b)]) of that entity; or

(iii) who was described in clause (i) but is no longer so described because of a transfer of ownership or control interest, in anticipation of (or following) a conviction, assessment, or exclusion described in subparagraph (B) against the person, to an immediate family member (as defined in subsection (j)(1)) or a member of the household of the person (as defined in subsection (j)(2)) who continues to maintain an interest described in such clause—

is a person—

(B)(i) who has been convicted of any offense described in subsection (a) or in paragraph (1), (2), or (3) of this subsection;

(ii) against who a civil monetary penalty has been assessed under [42 U.S.C. 1320a–7a or 1320a–8];

(iii) who has been excluded from participation under a program under [42 U.S.C. 1395 *et seq.*] or under a State health care program.

42 U.S.C. 1320a–7(b)(8).

significantly abused their authority to dispense controlled substances.

Clearly, the overly limited bases in current law for denial or revocation of a practitioner's registration do not operate in the public interest.

Id. Accordingly, Congress amended section 824(a) ''to add to the current bases for * * * revocation[] or suspension of registration a finding that registration would be inconsistent with the public interest *on the grounds specified in 21 U.S.C. § 823.'' Id.* at 3449 (emphasis added).

The House Report thus makes clear that Congress's primary purpose in authorizing revocation based on the public interest was to provide an additional means for the Attorney General to *address diversion by practitioners.* This is also made clear by Congress's command that the public interest be ''determined under'' the factors set forth in 21 U.S.C. 823, most of which—in the case of a practitioner—require a nexus to controlled substances. *See* 21 U.S.C. 823(f) (directing the Attorney General to consider, *inter alia,* a registrant's ''experience in dispensing * * * controlled substances,'' its ''conviction record under * * * laws relating to the * * * dispensing of controlled substances,'' and its ''[c]ompliance with applicable * * * laws relating to controlled substances'').[11]

It was not until three years later when, as part of the Medicare and Medicaid Patient and Program Protection of 1987, Congress amended subsection 824(a) to grant the Attorney General authority to revoke a registration of any individual or entity subject to mandatory exclusion from Medicare and Medicaid (as well as other Federally funded health care programs). *See* Public Law 100–93, § 8(j), 101 Stat. 680, 695 (1987). *See also* S. Rep. No. 100–109, at 2, 1987 U.S.C.C.A.N. at 682–83 (''The Committee bill has four main elements. * * * First, the bill mandates the exclusion from Medicare and Medicaid of individuals convicted of program-related crimes or patient abuse or neglect. It also broadens the grounds for the discretionary exclusion of health care providers from Medicare and Medicaid. * * * *The Attorney General is authorized to deny, revoke, or suspend the controlled substances registration of any individual or entity subject to mandatory exclusion from Medicare.*)[12] (emphasis added).

Were the Government's interpretation correct that the Attorney General's authority under the public interest standard encompasses the allegations against Respondent, then Congress had no need to enact subparagraph (a)(5). Statutes, however, are not to be construed in a manner that renders their texts superfluous. *See Bloate,* 130 S.Ct. at 1355 (quoting *Duncan* v. *Walker,* 533 U.S. 167, 174 (2001) (''[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'')). I therefore hold that the allegations that Respondent is the alter ego of Duncan Drugs, which has been convicted of health care fraud, as well as that Respondent materially falsified its state Medicaid application and did not disclose ownership information to the State, do not constitute ''such other conduct which may threaten public health and safety.'' 21 U.S.C. 823(f).

Accordingly, the allegations that Respondent is the alter ego of Duncan Drugs, which was convicted of health care fraud; that Respondent materially falsified its application to enroll in the Georgia Medicaid program; and that it failed to provide information requested by the DCH do not implicate any of the five public interest factors set forth in 21 U.S.C. 823(f), and thus do not provide a basis to conclude that Respondent has committed acts which render its registration ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). Whether these allegations are grounds for the revocation of Respondent's DEA registration must be assessed under the legal standard which Congress specifically adopted in subparagraph (a)(5).[13]

Under this standard, however, even if DCH had proved the allegations, Respondent would not have been subject to ''mandatory exclusion'' by the Secretary pursuant to her authority under 42 U.S.C. 1320a–7(a), but rather only ''permissive exclusion'' pursuant to her authority under 42 U.S.C. 1320a–7(b). Accordingly, even if the DCH proceeding had resulted in Respondent's exclusion by the Secretary, because subparagraph (a)(5) unambiguously limits the Agency's revocation authority to where a registrant is subject to mandatory exclusion, the fact of permissive exclusion would not, by itself, provide a basis to revoke its DEA registration.

Indeed, the only substantial evidence in this record that Respondent (or for that matter, Duncan Drugs) ''has committed such acts as would render [its] registration under section 823 * * * inconsistent with the public interest,'' 21 U.S.C. 824(a)(4), is that pertaining to the three recordkeeping violations found during the May 2006 inspection. As found above, during the inspection, the DI found that Respondent did not have an initial inventory, *see* 21 CFR 1304.11(b), had not executed a power of attorney form to indicate who was authorized to order schedule II drugs on its behalf, *Id.* 1305.05(a), and had not been completing the DEA Forms 222 to indicate the dates on which it had received certain drugs. 21 CFR 1305.13(e).

Mr. Scharff, Respondent's Pharmacist-In-Charge, took responsibility for these deficiencies and was found by the ALJ to have credibly testified that they were corrected as soon as the DI brought them to his attention. ALJ at 23. Moreover, in its brief, the Government does not even cite these violations.

I therefore conclude that the Government has not proved that Respondent has committed acts which render its continued registration ''inconsistent with the public interest'' as that term has been defined by Congress for purposes of the CSA.[14] 21

[11] With respect to factor five—''other conduct which may threaten public health and safety''—DEA's case law has generally recognized that the misconduct must be related to controlled substances. *David E. Trawick,* 53 FR 5326, 5327 (1988). While there may be other acts, which do not directly involve controlled substances, but which threaten public health and safety and create reason to conclude that a person will not faithfully adhere to her responsibilities under the CSA, in light of Congress's clear statutory text and the history of the CSA, this case presents no occasion to consider the scope of actionable conduct under this factor.

[12] It acknowledged that in discussing Section 8 of the Medicare and Medicaid Patient and Program Protection Act, the Senate Report states that ''[t]he bill would amend the Controlled Substances Act to add exclusion from Medicare or a State health care program as a basis for the denial, revocation, or suspension of registration to manufacture, distribute or dispense a controlled substance.'' S. Rep. at 22, 1987 U.S.C.C.A.N. at 702. While this discussion is arguably read as indicating that Section 8 applied to both mandatory and permissive exclusions, legislative history cannot override a clear and unambiguous statutory text. *See United States* v. *Gonzales,* 520 U.S. 1, 6 (1997). (''Given the straightforward statutory command, there is no reason to resort to legislative history.'') (citation omitted).

[13] To make clear, where an allegation both implicates a public interest factor (or another of the Agency's revocation authorities), and also triggers the Secretary's permissive exclusion authority, DEA retains the authority to revoke under the applicable authority of 21 U.S.C. 824. Thus, while a misdemeanor conviction relating to controlled substances falls within the Secretary's permissive exclusion authority, *see* 42 U.S.C. 1320a–7(b)(3), DEA can still consider this conduct under the public interest standard. *See* 21 U.S.C. 823(f). Likewise, while the revocation or suspension of a physician's state medical license also falls within the Secretary's permissive exclusion authority, DEA can revoke the practitioner's registration under 21 U.S.C. 824(a)(3).

[14] The ALJ recommended, however, that Respondent's registration be ''subject to the condition that Mr. Fordham shall have no involvement with Respondent in any capacity,

U.S.C. 824(a)(4). However, I conclude that the recordkeeping violations warrant that Respondent be admonished, which shall be made a part of Respondent's official record with the Agency.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b), I order that Terese, Inc., d/b/a/Peach Orchard Drugs, be, and it hereby is, admonished. I further order that the application of Terese, Inc., to renew its DEA Certificate of Registration, be, and it hereby is, granted. This Order is effective immediately.

Dated: July 26, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–19556 Filed 8–2–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

National Institute of Corrections

Solicitation for a Cooperative Agreement: Curriculum Development for Women Offenders; Developing an Agency-Wide Approach

AGENCY: National Institute of Corrections, U.S. Department of Justice.

ACTION: Solicitation for a Cooperative Agreement.

SUMMARY: The National Institute of Corrections (NIC) is seeking applications from organizations, groups or individuals to enter into a cooperative agreement for an 18-month period for the development and piloting of a curriculum specific to working with justice involved women. NIC has developed and delivered a number of training programs specific to management of women offenders. Each such program targets varied audiences and objectives, all with the common goal of improving justice system and individual outcomes for women offenders in the criminal justice system. Since the original ''Women Offenders: Developing an Agency-Wide Approach'' was delivered, significant findings specific to women have emerged, increasing our understanding of the risk, needs, and strengths of this population. This solicitation is for the development of a blended-learning curriculum that can be used to guide correctional leadership teams representing jails, prisons, and/or community corrections in planning an agency-wide process for the effective management of justice involved women. The curriculum will incorporate research-based information and will reflect adult learning theory using blended learning and Web-based technology.

DATES: Applications must be received by 4 p.m., E.D.T., August, 22, 2011.

ADDRESSES: Mailed applications must be sent to: Director, National Institute of Corrections, 320 First Street, NW., Room 5002, Washington, DC 20534. Applicants are encouraged to use Federal Express, UPS, or similar service to ensure delivery by the due date.

Hand delivered applications should be brought to 500 First St., NW., Washington, DC 20534. At the front security desk, dial 7–3106, ext. 0 for pickup. Faxed or e-mailed applications will not be accepted. Electronic applications can only be submitted via *http://www.grants.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this announcement and links to the required application forms can be downloaded from the NIC Web site at *http://www.nicic.gov/cooperative agreements.*

All technical or programmatic questions concerning this announcement should be directed to Maureen Buell, Correctional Program Specialist, National Institute of Corrections, Administrative Division. Ms. Buell can be reached directly at 1–800–995–6423 ext. 40121 or by e-mail at *mbuell@bop.gov.* In addition to the direct reply, all questions and responses will be posted on NIC's Web site at *http://www.nicic.gov* for public review (the names of those submitting questions will not be posted). The Web site will be updated regularly and postings will remain on the Web site until the closing date of this cooperative agreement solicitation. Only questions received by 12 p.m. (E.D.T.) on August 17, 2011 will be answered.

SUPPLEMENTARY INFORMATION:

Overview: The curriculum ''Women Offenders: Developing an Agency Approach'' was originally developed in 2002 and since that time a number of program modules have been revised to reflect emerging information and practices. This curriculum has been offered to agency leaders with roles in developing and/or implementing policy within their organizations. The final product from this solicitation will reflect the emerging research and use a blended-learning format.

Over the past decade there have been significant contributions to correctional practices with evidence-based research and knowledge. More recently, emerging research has identified areas that contribute to women's risk in institutional and/or community corrections settings. Some of these areas include housing safety, history of family conflict, victimization as a child and adult, dysfunctional relationships, and parental stress among other areas. Also factored in are areas of strength and resiliency which, when applied properly, can contribute to an agencies' case management and supervision strategies with a focus remaining on staff, offender, institutional and community safety. Through the incorporation of this information in professional development programs, agencies can become better equipped to manage a population that has increased dramatically since the 1990s and brings a unique set of challenges yet present reduced levels of risk to correctional and community settings.

Background: Since the 1970s, rates of women's involvement in criminal justice has increased dramatically and more recently surpassed the rate at which men have been entering the system. From 1995 to 2005, the total number of female prisoners increased 57% compared to 34% increase for male prisoners (Harrison & Beck [2006] Prison and Jail Inmates at Midyear 2005 [NCJ Publication No. 213133]), primarily for drug and property related offenses. At years end 2008, 35% of women were serving sentences for violent offenses versus 53% of men; 29% of women were serving sentences for property crimes and 26% for drug-related crimes versus 17% of men for both property crime and drug offenses (BJS, West, H. and Sabol W, December 2010, NCJ 231675), respectively. Other state and federal legislation has had severe consequences for women with children in both incarcerative and community-based settings. The impact of these legislative changes is often not well understood by correctional policymakers. The Adoption and Safe Families Act of 1993, Temporary Assistance for Needy Families (TANF), and public housing restrictions are just some of the laws that have unintended consequences for justice-involved women. According to a 2009 report from Bureau of Justice Statistics, since 1991, the number of children with a mother in prison has more than doubled, up 131%, while the number of children with a father in prison has grown by 77%. This finding reflects a faster rate of growth in the number of mothers held

including ownership, management, or as an employee, and shall exercise no influence or control, direct or indirect, over the operation of Respondent.'' ALJ at 27. As noted above, in sentencing Duncan Fordham, the United States District Court ordered Duncan Fordham that ''he is not to be employed with or without compensation in any pharmacy.'' GX 15, at 4.

in state and federal prisons (up 122%), compared to the number of fathers (up 76%) between 1991 and midyear 2007 (Parents in Prison and Their Minor Children, Glaze, L. and Maruschak, L. April, 2008 NCF #222984). This is significant for both justice-involved men and women but is rarely reflected in correctional policy and practice. Other significant legislation has been the criminalization in all 50 states of sexual misconduct between staff and inmates and the Prison Rape Elimination Act (PREA). Although the original legislation was not specifically focused on women, the research that has since emerged on women via PREA has informed how we view sexual safety and predatory behavior involving offender-to-offender and staff-to-women offender offenses in correctional settings. Historically, correctional practices have been developed to meet the needs of the larger, male offender population, with the assumption that they should work equally well for men and women. Correctional practice has begun to incorporate some of the findings from the evidence-based research around risk reduction, and where correctly applied, it has resulted in improving policy and practice for male and female populations. However, many of the current correctional practices also have had the unintended consequence of driving women deeper into the system; particularly those with significant trauma histories, parental responsibilities, and lower levels of risk. With the emergence of gender-informed research and knowledge, identifying areas of risk and need more relevant to women has provided opportunities to focus and sharpen our practices in managing women with the objective of improving both intermediate and distal outcomes.

Over the years, NIC has been in a position to work closely with policy makers, practitioners, academics, researchers and private/public entities that work with or are interested in gender-informed practices with women. As a result, NIC has launched a number of initiatives focused on women in pretrial, jails, prisons and community-based supervision settings. These initiatives include validated women's risk and need assessments, the Women Offender Case Management Model, and the Gender-Informed Practices assessment (for more information go to *http://www.nicic.gov/womenoffenders*). A recent draft document from the National Resource Center for Justice Involved Women (NRCJIW) identified ten areas that corrections professionals should be aware of when developing policy and practice with respect to women. These areas include: (a) The rate at which women are entering the criminal justice system while demonstrating a reduced risk to public safety; (b) correctional practices considered to be gender-neutral have been built around the management of male offenders, yet approaches that are gender-responsive increase the potential for improved outcomes; (c) policy and practice should reflect women's risk, needs, and strengths, which would contribute to increased success under community supervision; (d) risk/need instruments have not been validated on a female population and do not accurately reflect custody designations or programming targets; (e) justice-involved women have significantly high rates of childhood and adult victimization experiences (physical, verbal, and sexual abuse) which relates to their pathways into the correctional systems as well as informing their day-to-day behaviors; and (f) women with minor children are faced with significant challenges and responsibilities, whether they are incarcerated or under community supervision. This learning has been incorporated into much of NIC's work with women, but as the correctional landscape evolves, changes must be reflected in our products to the field.

Purpose: This solicitation is an opportunity to develop a curriculum specific to women offenders that incorporates the emerging findings, grounded in research and theory, applicable to correctional leadership teams with policymaking or implementation responsibilities. NIC is soliciting applications to develop an evidence-based, gender-informed curriculum with the goal of preparing administrators and managers to develop, enhance, and direct policy that will impact justice-involved women (pretrial, jails, prisons, community supervision) and the systems that manage this population. The curriculum will use a professional instructional design system as well as a learner centered model for effective training. The final deliverable product, reflecting a blended learning style of delivery will result from a collaborative planning process with the National Institute of Corrections and identified subject matter experts.

Scope of Work: The cooperative agreement awardee will design, develop, pilot, revise and finalize a curriculum that will address critical areas of information that are unique to and/or occurring with significant frequency with women and will support agency leaders representing jails, prisons, and/or community corrections organizations in the development and implementation of gender-informed policy and practice.

The curriculum must use a professional model of instructional design that incorporates elements of blended learning and will draw upon the knowledge of subject matter experts and curriculum design specialists. The design should use resources that are cost effective, reduce the number of on-site classroom training days, and incorporate a site assessment of current practices for strengths, challenges, and opportunities that impact planning and implementation processes. The curriculum must identify overall goals and objectives collectively and specifically for each module that will support the participant teams in their agency planning process. The curriculum should incorporate foundational research/knowledge on justice-involved women as well as guidance for sites to conduct gap analysis; plan in the context of fiscal, political, and cultural environments; identify desired change targets and methods to measure success and outcomes; ensure a research/knowledge base for items in the curriculum and use of technology and software where appropriate. The applicant must also develop a plan for selecting a site to implement the pilot curriculum and collecting feedback that will be used to make revisions to finalize the curriculum. This will require choosing subject matter experts to deliver the pilot on site. Additionally, the development of a method of process evaluation is required. These are minimum project requirements.

Key issues and challenges to developing and piloting this curriculum may include: Developing a blended learning design that is flexible enough to adapt to varying levels of participant knowledge, *e.g.,* participants who are familiar with gender-informed research as well as participants who are new to this information; Curriculum that is research based, timely, and incorporates necessary elements to prepare agency management properly in the planning process for establishing gender-informed policy and practice in their agencies; Understanding differences in jail, prison and community corrections environments in the curriculum design; and determining a process for selecting and preparing a pilot site as well as implementation of the curriculum using subject matter experts.

Document Length: The length of the document should be determined by content. Brevity and clarity are encouraged.

Intended Audience: The primary audience for this curriculum is the leadership and management of correctional organizations interested in planning for the implementation of gender-informed policy and practice for their population of justice-involved women.

Distribution: This product is intended to be distributed widely throughout the corrections field and will be available on the NIC Web site free of charge through the NIC Information Center.

Meetings: The cooperative agreement awardee will attend an initial meeting with NIC staff for a project overview and preliminary planning prior to September 30, 2011. This meeting will be held in Washington, DC, or Aurora, CO, both official office sites of National Institute of Corrections. Additionally, the awardee should plan to meet with NIC staff routinely as determined by NIC and the awardee during the course of the cooperative agreement. Meetings will be held no less than quarterly and may be conducted via webinar or in person as agreed upon by NIC and the awardee.

Project Deliverables: The final product will reflect revisions made to the curriculum post-pilot and a plan for process evaluation. The awardee must provide a detailed work plan with timelines and milestones for accomplishing project activities to the assigned NIC staff for approval prior to any work to being performed under this agreement and must designate a point of contact that would serve as the conduit of information between the NIC staff and the awardee.

Document preparation: For all awards in which a document will be a deliverable, the awardee must follow the Guidelines for Preparing and Submitting Manuscripts for Publication as found in the ''General Guidelines for Cooperative Agreements,'' which will be included in the award package. All final publications submitted for posting on the NIC Web site must meet the federal government's requirement for accessibility (508 PDF and 508 HTML file or other acceptable format). All documents developed under this cooperative agreement must be submitted in draft form to NIC for review prior to the final products are delivered.

Application Requirements: An application package must include OMB Standard Form 424, Application for Federal Assistance; a cover letter that identifies the audit agency responsible for the applicant's financial accounts as well as the audit period or fiscal year under which the applicant operates (*e.g.* July 1 through June 30); an outline of projected costs with the budget and strategy narratives described in the announcement. The following additional forms must also be included: OMB Standard Form 424A, Budget Information—Non-Construction Programs; OMB Standard Form 424B, Assurances—Non—Construction Programs (both available at *http://www.grants.gov*); DOJ/FBOP/NIC Certification Regarding Lobbying, Debarment, Suspension and Other Responsibility Matters; and the Drug-Free Workplace Requirements (available at *http://www.nicic.gov/Downloads/general/certif-frm.pdf*).

Applications should be concisely written, typed double spaced, and reference the NIC opportunity number and title referenced in this announcement. If you are hand delivering or submitting via Fed-Ex, please include an original and three copies of your full proposal (program and budget narrative, application forms, assurances, and other descriptions). The original should have the applicant's signature in blue ink. Electronic submissions will be accepted only via *http://www.grants.gov.*

Place the following at the top of the abstract: Project title; applicant name (legal name of applicant organization); mailing address; contact phone numbers (voice, fax); e-mail address; Web site address, if applicable.

The narrative portion of the application should include, at a minimum: A statement indicating the applicant's understanding of the project's purpose, goals and objectives. The applicant should state this in language other than that used in the solicitation (*i.e.,* do not simply repeat the wording from the solicitation).

Project Design and Implementation: This section should describe the design and implementation of the project and how the key design and implementation issues and challenges will be addressed.

Project Management: Chart of measurable project milestones and timelines for the completion of each milestone.

Capabilities and Competencies: This section should describe the qualifications of the applicant organization and any partner organizations to do the work proposed and the expertise of key staff to be involved in the project. Attach resumes that document relevant knowledge, skills, and abilities to complete the project for the principle investigator and each staff member assigned to the project. If the applicant organization has completed similar projects in the past, please include the URL/Web site or ISBN number for accessing a copy of the referenced work.

Budget: The budget should detail all costs for the project, show consideration for all contingencies for the project, note a commitment to work within the proposed budget, and demonstrate the ability to provide deliverables reasonably according to schedule.

Authority: Public Law 93–415.

Funds Available: NIC is seeking the applicant's best ideas regarding accomplishment of the scope of work and the related costs for achieving the goals of this solicitation. Funds may be used only for the activities that are linked to the desired outcome of the project. The funding amount should not exceed $135,000.

Eligibility of Applicants: An eligible applicant is any state or general unit of government, private agency, educational institution, organization, individual, or team with expertise in the described areas. Applicants must have demonstrated ability to implement a project of this size and scope. To be considered, applicants must demonstrate, at a minimum: (1) In-depth knowledge of research and practice regarding gender-informed (women) and evidence-based practices; (2) in-depth knowledge of practices, programs, and complexities in effectively working with women offenders as well as the system and staff challenges; (3) in-depth knowledge about the risk/need and strengths and capacity for resiliency with justice-involved women; (4) specific examples of expertise in directing project design, implementation, particularly with regard to curriculum development, and training; (5) demonstrated ability to work in collaboration with other experts in the field of gender-informed practices; and (6) ability and capacity to conduct Web-based events.

Review Considerations: Applications will be reviewed by a team. Among the criteria used to evaluate the applications are indication of a clear understanding of the project requirements; background, experience, and expertise of the proposed project staff, including any sub-contractors; effectiveness of an innovative approach to the project; a clear, concise description of all elements and tasks of the project, with sufficient and realistic time frames necessary to complete the tasks; technical soundness of project design and methodology; financial and administrative integrity of the proposal, including adherence to federal financial guidelines and processes; a sufficiently detailed budget that shows consideration of all contingencies for

this project and commitment to work with the budget proposed; and indication of availability work with NIC staff.

Review Considerations: Applications received under this announcement will be subject to a collaborative review process. The criteria for the evaluation of each application will be as follows:

Programmatic: 40 Points.

Are all of the tasks and activities adequately covered? Is there a clear description of how each project activity will be accomplished, including major tasks, the strategies to be employed, required staffing, responsible parties, and other required resources? Are there any unique or exceptional approaches, techniques, or design aspects proposed that will enhance the project?

Project Management and Administration: 20 Points.

Does the applicant identify reasonable objectives, milestones, or measures to track progress? Are the proposed management and staffing plans clear, realistic, and sufficient to carry out the project? Is the applicant willing to meet with NIC as specified in the solicitation for this cooperative agreement?

Organizational and Project Staff Background: 30 Points.

Do the skills, knowledge, and expertise of the organization and the proposed project staff demonstrate a high level of competency to carry out the tasks? Does the applicant/organization have the necessary experience and organizational capacity to carry out all goals of the project? If consultants and/or partnerships are proposed, is there a reasonable justification for their inclusion in the project and a clear structure to ensure effective coordination?

Budget: 10 Points.

Is the proposed budget realistic? Does it provide sufficient cost detail/narrative? Does it represent good value relative to the anticipated results? Does the application include a chart that aligns the budget with project activities along a timeline with, at a minimum, quarterly benchmarks? In terms of program value, is the estimated cost reasonable in relation to work performed and project products?

Note: NIC will NOT award a cooperative agreement to an applicant who does not have a Dun and Bradstreet Database Universal Number (DUNS) and is not registered in the Central Contractor Registry (CCR).

Applicants can obtain a DUNS number at no cost by calling the dedicated toll-free request line at 800–333–0505. Applicants who are sole proprietors should dial 866–705–5711 and select option #1.

Applicants may register in the CCR online at the CCR *Web site: http://www.ccr.gov.* Applicants can also review a CCR handbook and worksheet at this Web site.

Number of Awards: One.

NIC Opportunity Number: 11AD13. This number should appear as a reference line in the cover letter, where the opportunity number is requested on Standard Form 424, and outside of the envelope in which the application is sent.

Catalog of Federal Domestic Assistance Number: 16.601.

Executive Order 12372: This project is not subject to the provisions of Executive Order 12372.

Morris L. Thigpen,

Director, National Institute of Corrections.

[FR Doc. 2011–19561 Filed 8–2–11; 8:45 am]

BILLING CODE 4410–36–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–80,106]

Workers From Kelly Services, Working On-Site at Delphi Automotive Systems, LLC, Powertrain Division, El Paso, TX; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on July 5, 2011, applicable to leased workers from Kelly Services working on-site at Delphi Automotive Systems, LLC, El Paso, Texas. The workers are engaged in activities related to warehousing and distribution of automotive components. The notice will be published soon in the **Federal Register**.

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. New information shows the correct name of the subject firm in its' entirety should read leased workers from Kelly Services, working on-site at Delphi Automotive Systems, LLC, Powertrain Division, El Paso, Texas.

Accordingly, the Department is amended this certification to correct the name of the subject firm to read leased workers from Kelly Services, working on-site at Delphi Automotive Systems, LLC, Powertrain Division, El Paso, Texas.

The amended notice applicable to TA–W–80,092 is hereby issued as follows:

All leased workers from Kelly Services, working on-site at Delphi Automotive Systems, LLC, Powertrain Division, El Paso, Texas, who became totally or partially separated from employment on or after April 5, 2010, through July 5, 2013, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 22nd day of July 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–19577 Filed 8–2–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,036; TA–W–75,036A]

Panasonic Corporation of North America, Business Operations Group, Rolling Meadows, IL; Panasonic Corporation of North America, Financial Services Organization, Rolling Meadows, IL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor (Department) issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on April 7, 2011, applicable to workers of Panasonic Corporation of North America, Business Operations Group, Rolling Meadows, Illinois. The workers provide administrative, sales and distribution services. The Notice was published in the **Federal Register** on April 22, 2011 (76 FR 22731).

At the request of a company official, the Department reviewed the certification for workers of the subject firm.

New information provided by the company shows that Business Operations Group and Financial Services Organization are part of the same administrative subdivision and work in conjunction with one another in the same building, serve the same

customer units and both are impacted by the shift in services to India.

Based on these findings, the Department is amending the certification to include employees of Financial Services Organization of Panasonic Corporation of North America, Rolling Meadows, Illinois (TA–W–75,036A).

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by a shift in services to India.

The amended notice applicable to TA–W–75,036 is hereby issued as follows:

All workers of Panasonic Corporation of North America, Business Operations Group, Rolling Meadows, Illinois (TA–W–75,036) and Panasonic Corporation of North America, Financial Services Organization, Rolling Meadows, Illinois (TA–W–75,036A), who became totally or partially separated from employment on or after November 22, 2009 through April 7, 2013, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 26th day of July 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–19580 Filed 8–2–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,067; TA–W–75,067A]

JLG Industries, Inc., Access Segment, a Subsidiary of Oshkosh Corporation, Including On-Site Leased Workers From Aerotek, McConnellsburg, PA; JLG Industries, Inc., Access Division, a Subsidiary of Oshkosh Corporation, Hagerstown, MD; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on March 9, 2011, applicable to workers and former workers of JLG Industries, Inc., Access Segment, a subsidiary of Oshkosh Corporation, including on-site leased workers of Aerotek, McConnellsburg, Pennsylvania (JLG-McConnellsburg). The workers produce access equipment. The Department's Notice was published in the **Federal Register** on March 23, 2011 (76 FR 16449).

At the request of a worker separated from the Hagerstown, Maryland facility, the Department reviewed the certification for workers of JLG-McConnellsburg.

New information supplied by the workers and confirmed by JLG Industries, Inc. revealed that the Hagerstown, Maryland facility operated in conjunction with JLG-McConnellsburg in the production of access equipment and supplied design engineering, global procurement supply chain, safety, and reliability services used in the production of equipment at JLG-McConnellsburg.

Based on these findings, the Department is amending this certification to properly reflect these matters.

The amended notice applicable to TA–W–75,067 is hereby issued as follows:

All workers of JLG Industries, Inc., Access Segment, a subsidiary of Oshkosh Corporation, including on-site leased workers from Aerotek, McConnellsburg, Pennsylvania (TA–W–75,067), who became totally or partially separated from employment on or after January 3, 2011, through March 9, 2013, and all workers in the group threatened with total or partial separation from employment on March 9, 2011 through March 9, 2013, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended; and all workers of JLG Industries, Inc., Access Division, a subsidiary of Oshkosh Corporation, Hagerstown, Maryland (TA–W–75,067A), who became totally or partially separated from employment on or after January 3, 2009, through March 9, 2013, and all workers in the group threatened with total or partial separation from employment on March 9, 2011 through March 9, 2013, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC this 11th day of July, 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–19581 Filed 8–2–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–73,218; TA–W–73,218A]

International Business Machines Corporation, ITD Business Unit, Division 7, E-mail and Collaboration Group, Including Workers Off-Site From Various States in the United States Reporting to Armonk, NY; International Business Machines Corporation, Web Strategy and Enablement Organization, Including Workers Off-Site From Various States in the United States Reporting to Armonk, NY; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor (Department) issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on May 14, 2010, applicable to workers of International Business Machines Corporation (IBM), ITD Business Unit, Division 7, E-mail and Collaboration Group, including workers off-site from various states in the United States reporting to Armonk, New York. The workers are engaged in employment related to the supply of system server support for e-mail and data servers related to Division 7. The Department's Notice was published in the **Federal Register** on May 28, 2010 (75 FR 30067).

At the request of workers, the Department reviewed the certification for workers of the subject firm. The company confirmed that workers of the Web Strategy and Enablement Organization provided support to the IDT Business Unit and reported to the Armonk, New York facility. The company also confirmed that a number of workers assigned to the Web Strategy and Enablement Organization are located in various states in the United States and report to the Armonk, New York facility.

Based on these findings, the Department is amending this certification to include workers of International Business Machines Corporation, Web Strategy and Enablement Organization, including workers off-site from various states in the United States reporting to Armonk, New York (TA–W–73,218A).

The amended notice applicable to TA–W–73,218 is hereby issued as follows:

All workers of International Business Machines Corporation (IBM), ITD Business Unit, Division 7, E-mail and Collaboration

Group, including workers off-site from various states in the United States reporting to Armonk, New York, Armonk, New York (TA–W–73,218), and all workers of International Business Machines Corporation (IBM), Web Strategy and Enablement Organization, including workers off-site from various states in the United States reporting to Armonk, New York, Armonk, New York (TA–W–73,218A), who became totally or partially separated from employment on or after January 6, 2009, through May 14, 2012, and all workers in the group threatened with total or partial separation from employment on May 14, 2010 through May 14, 2012, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.''

Signed in Washington, DC this 25th day of July, 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–19579 Filed 8–2–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,450]

Hewlett Packard Company, Imaging and Printing Group, World Wide Product Data Management Operations, Including On-Site Leased Workers From Manpower Professional, Now Known As Experis, Boise, IH; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on May 11, 2010, applicable to workers of Hewlett Packard Company, Imaging and Printing Group, World Wide Products Data Management Operations, Boise, Idaho and Fort Collins, Colorado. The workers developed, prototyped and tested hardware, firmware, and software. The notice was published in the **Federal Register** on May 28, 2010 (75 FR 30067).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The company reports that workers leased from Manpower Professional, now known as Experis, were employed on-site at the Boise, Idaho location of Hewlett Packard Company, Imaging and Printing Group, World Wide Product Data Management Operations. The Department has determined that these workers were sufficiently under the control of Hewlett Packard Company, Imaging and Printing Group, World Wide Product Data Management Operations to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Manpower Professional, now known as Experis, working on-site at the Boise, Idaho location of Hewlett Packard Company, Imaging and Printing Group, World Wide Product Data Management Operations.

The amended notice applicable to TA–W–71,450 is hereby issued as follows:

All workers of Hewlett Packard Company, Imaging and Printing Group, World Wide Product Data Management Operations, including on-site leased workers from Manpower Professional, now known as Experis, Boise, Idaho (TA–W–71,450), and Hewlett Packard Company, Imaging and Printing Group, World Wide Product Data Management Operations, Fort Collins, Colorado (TA–W–71,450A), who became totally or partially separated from employment on or after June 24, 2008, through May 11, 2012, and all workers in the group threatened with total or partial separation from employment on the date of certification through May 11, 2012, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC this 22nd day of July, 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–19578 Filed 8–2–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,090]

Wausau Daily Herald, Advertising Production Division, a Subsidiary of Gannett Co., Inc.,Wausau, WI; Notice of Negative Determination on Reconsideration

On March 18, 2011, the Department issued an Affirmative Determination Regarding Application for Reconsideration regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of Wausau Daily Herald, Advertising Production Division, a Subsidiary of Gannett Co., Inc., Wausau, Wisconsin (subject firm). The Department's Notice was published in the **Federal Register** on March 29, 2011 (76 FR 17446). Workers were engaged in employment related to the supply of graphic design services for newspaper advertisements.

The initial investigation resulted in a negative determination based on the findings that, during the relevant period, the subject firm did not shift to/acquire from a foreign country services like or directly competitive with the graphic design work supplied at the subject firm, or import these services from a foreign country. The Department collected information that revealed that worker group separations at the subject firm were attributable to a domestic shift of operations.

In the March 1, 2011 request for reconsideration, the petitioner alleged that ''ads submitted to 2SdPro, India'' demonstrate that ''Gannett is outsourcing ads in order to reduce the workforce.'' The petitioner also asserts that attachments to the petition support the allegation of a shift of services to India. Several of the attachments are printouts of articles from Gannettoid.com, which is a Web site that is not affiliated with Gannett Company, Inc.

The petition attachments consist of:

- A January 4, 2011 letter from the petitioner that states, in part, ''in April of 2010'' a portion of all online ads were sent to 2Adpro, that the ''consolidation enables Gannett to eliminate all graphic artist positions at all Gannett daily newspapers (10 sites in Wisconsin) by outsourcing ads, and that the ''ad centers in Des Moines, IA and Indianapolis, IN are centers in which all the ads flow through * * * then * * * sent to 2AdPro in India'';
- An August 5, 2010 separation notification letter;
- A document titled ''Articles explaining Gannett action in reducing Ad Services Staff in all Gannett sites in the U.S.'';
- A November 23, 2009 ''Gannettoid'' article titled ''Tentative rollout schedule set for GPCs'';
- An August 20, 2009 ''Gannettoid'' article titled ''Ad Centers lead to cuts, big savings'';
- A September 2, 2009 ''Gannettoid'' article titled ''Company confirms RABC reports'';
- An August 27, 2009 ''Gannettoid'' article titled ''When will GCI confirm consolidation?'';
- An August 17, 2009 ''Gannettoid'' article titled ''Ad production plans include layoffs'';
- A December 8, 2010 press release from Gannett;
- A June 6, 2008 article on *http://ashvegas.squarespace.com* titled ''Citizen-Times outsourcing jobs to India?'';

• Screenshots of a ''job order list'' from ''Zaapro Jobdirect'' with a handwritten note ''ads sent to 2AdPro India while still working at Wausau Daily Herald. From Wausau to India'' (referenced in the January 4, 2011 letter);

• A list of newspapers or Gannett affiliates, with contact information (referenced in the January 4, 2011 letter); and

• An undated ''Gannettoid'' article titled ''Tracking layoffs'' with a handwritten note ''See page 10 for Wisconsin.''

During the reconsideration investigation, the Department carefully reviewed information previously submitted from Gannett Co., Inc. and the petitioning worker group as well as information provided in the request for reconsideration and additional information submitted by the State of Wisconsin Dislocated Worker Program case manager assigned to the petitioner.

During the reconsideration investigation, the Department also collected new information from Gannett Co., Inc. regarding domestic and foreign operations in order to address the allegations and obtained clarification of previously-submitted information.

A careful review of previously-submitted information revealed that 2AdPro (an advertising firm located in India) handled an insignificant amount of overflow work for the subject firm and that the work that was transferred from the subject worker group in October 2010 was shifted to the Gannett Production Center and not to 2AdPro and that the plan to create the Gannett Production Center (GPC) dates back to October 2007.

Information obtained during the reconsideration investigation confirmed that workers and former workers of Wausau Daily Herald, Advertising Production Division, a Subsidiary of Gannett Co., Inc., Wausau, Wisconsin (subject worker group) performed advertising production work on computers for print and on-line publications, that advertising publication at the subject firm was consolidated into a Gannett corporate operation located in Des Moines, Iowa and Indianapolis, India in October 2010, that the corporate operation is known as the Gannett Production Center (GPC), and that workers who chose not to transfer to the GPC were separated.

New information obtained during the reconsideration investigation revealed that the contract between Gannett Co., Inc. and 2AdPro existed from September 2006 through March 2011 and that 2AdPro handled an insignificant amount of advertising production work outsourced from the subject facility prior to the consolidation of operations to the GPC.

Based on a careful review of information obtained during the initial and reconsideration investigations, the Department determines that neither a shift to a foreign country by the subject firm of services like or directly competitive with the graphic design work supplied by workers at the subject firm nor a foreign acquisition by the subject firm of such services, contributed importantly to subject worker group separations. Additionally, the subject firm did not increase imports of services like or directly competitive with those supplied by the subject worker group. Rather, worker separations at the subject firm in the period under investigation were attributable to a consolidation of domestic operations.

Conclusion

After careful reconsideration, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of Wausau Daily Herald, Advertising Production Division, a Subsidiary of Gannett Co., Inc., Wausau, Wisconsin.

Signed in Washington, DC this 20th day of July, 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–19582 Filed 8–2–11; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency proposes to request extension of a currently approved information collection used by individuals applying for a research card which is needed to use original archival records in a National Archives and Records Administration facility. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before October 3, 2011 to be assured of consideration.

ADDRESSES: Comments should be sent to: Paperwork Reduction Act Comments (NHP), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd, College Park, MD 20740–6001; or faxed to 301–713–7409; or electronically mailed to *tamee.fechhelm@nara.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301–837–1694, or fax number 301–713–7409.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) Whether the proposed information collection is necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of information technology; and (e) whether small businesses are affected by this collection. The comments that are submitted will be summarized and included in the NARA request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this notice, NARA is soliciting comments concerning the following information collection:

Title: Researcher Application.

OMB number: 3095–0016.

Agency form number: NA Form 14003.

Type of review: Regular.

Affected public: Individuals or households, business or other for-profit, not-for-profit institutions, Federal, State, Local or Tribal Government.

Estimated number of respondents: 18,487.

Estimated time per response: 8 minutes.

Frequency of response: On occasion.

Estimated total annual burden hours: 2,465 hours.

Abstract: The information collection is prescribed by 36 CFR 1254.8. The collection is an application for a research card. Respondents are individuals who wish to use original archival records in a NARA facility. NARA uses the information to screen

individuals, to identify which types of records they should use, and to allow further contact.

Dated: July 25, 2011.

Michael L. Wash,

Executive for Information Services/CIO.

[FR Doc. 2011–19619 Filed 8–2–11; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0046]

Qualification of Connection Assemblies for Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is issuing a revision to Regulatory Guide (RG) 1.156, ''Qualification of Connection Assemblies for Nuclear Power Plants.'' This guide describes a method that the NRC considers acceptable for complying with the Commission's regulations on the environmental qualification of connection assemblies and environmental seals in combination with cables or wires as assemblies for service in nuclear power plants. The environmental qualification helps ensure that connection assemblies can perform their safety functions during and after a design-basis event.

ADDRESSES: You can access publicly available documents related to this regulatory guide 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, 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 online in the NRC Library 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 the 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 regulatory guide is available electronically under ADAMS Accession Number ML111730464. The regulatory analysis may be found in ADAMS under Accession Number ML111730474.
- *Federal Rulemaking Web Site:* Public comments and supporting materials related to this regulatory guide can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2011–0046.

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FOR FURTHER INFORMATION CONTACT: Satish Aggarwal, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *telephone:* 301–251–7627 or e-mail: *Satish.Aggarwal@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is issuing a revision to an existing guide in the agency's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 1 of Regulatory Guide 1.156, ''Qualification of Connection Assemblies for Nuclear Power Plants,'' was issued with a temporary identification as Draft Regulatory Guide, DG–1254.

This guide provides information that supports Title 10 of the *Code of Federal Regulations,* part 50, ''Domestic Licensing of Production and Utilization Facilities'' (10 CFR Part 50), Appendix B, ''Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants,'' Criterion III, ''Design Control,'' and 10 CFR 50.49, ''Environmental Qualification of Electric Equipment Important to Safety for Nuclear Power Plants.''

II. Further Information

DG–1254 was published in the **Federal Register** (76 FR 10917) February 28, 2011, for a 60-day public comment period. The public comment period closed on April 27, 2011. Staff's responses to public comments on DG–1254 are available under ML111730478.

Dated at Rockville, Maryland, this 27th day of July 2011.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2011–19638 Filed 8–2–11; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. MC2011–26; Order No. 777]

Mail Classification Schedule Change

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request regarding classification changes to Priority Mail packaging. This document invites public comments on the request and addresses several related procedural steps.

DATES: *Comments are due:* August 4, 2011.

ADDRESSES: Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION: On July 26, 2011, the Postal Service filed a notice of two classification changes pursuant to 39 CFR 3020.90 and 3020.91 concerning Priority Mail packaging.[1]

The first change clarifies that, for Priority Mail boxes, the size limitations for each type of box will be based on cube size rather than specific, distinct dimensions. The Postal Service states that this minor change in dimensions corresponds with variances in customized packaging provided to commercial customers and the standardized packaging available at retail. *Id.* at 1. It asserts that use of cube-based size limitations will remove uncertainty in the marketplace regarding the box size limitations. *Id.*

[1] Notice of Minor Classification Changes, July 26, 2011 (Notice).

The second change adds a range of dimensions for Priority Mail Flat Rate Envelopes. *Id.* The Postal Service explains that the range will be more consistent with its Flat Rate Envelope packaging options for both retail and commercial customers. *Id.*

The Postal Service asserts that these changes will improve uniformity in the size limitation language in the Mail Classification Schedule (MCS) across all types of packaging and price categories within the Priority Mail product. It proposes conforming MCS language attached to its Notice.

The Commission establishes Docket No. MC2011–26 for consideration of matters related to the proposed classification change identified in the Notice.

Interested persons may submit comments on whether the Postal Service's request is consistent with the policies of 39 U.S.C. 3642 and generally with the provisions of title 39. Comments are due no later than August 4, 2011. The Postal Service's Notice can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints James F. Callow to serve as Public Representative in the captioned proceeding.

It is ordered:

1. The Commission establishes Docket No. MC2011–26 for consideration of matters raised by the Postal Service's Notice.

2. Comments by interested persons are due no later than August 4, 2011.

3. Pursuant to 39 U.S.C. 505, James F. Callow is appointed to serve as the officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2011–19669 Filed 8–2–11; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. A2011–33; Order No. 776]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Still Pond, Maryland post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

DATES: *Administrative record due (from Postal Service*): August 10, 2011; *deadline for notices to intervene:* August 22, 2011. *See* the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

ADDRESSES: Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 39 U.S.C. 404(d), on July 26, 2011, the Commission received a petition for review of the Postal Service's determination to close the post office in Still Pond, Maryland. The petition was filed by Craig O'Donnell (Petitioner) and is postmarked July 19, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2011–33 to consider Petitioner's appeal. If Petitioner would like to further explain his position with supplemental information or facts, Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than August 30, 2011.

Categories of issues apparently raised. Petitioner does not raise any concerns in his Petition.

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are legal issues, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the applicable administrative record with the Commission is August 10, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this notice is August 10, 2011.

Availability; Web site posting. The Commission has posted the appeal and supporting material on its Web site at *http://www.prc.gov.* Additional filings in this case and participants' submissions also will be posted on the Commission's Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at 202–789–6873 or via electronic mail at *prc-webmaster@prc.gov.*

The appeal and all related documents are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

Filing of documents. All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained. *See* 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

The Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than the Petitioner and respondent, wishing to be heard in this matter are directed to file a notice of intervention. *See* 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before August 22, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site unless a waiver is obtained for hardcopy filing. *See* 39 CFR 3001.9(a) and 3001.10(a).

Further procedures. By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. *See* 39 U.S.C. 404(d)(5). A procedural schedule has been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by the Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. *See* 39 CFR 3001.21.

It is ordered:

1. The Postal Service shall file the applicable administrative record regarding this appeal no later than August 10, 2011.

2. Any responsive pleading by the Postal Service to this notice is due no later than August 10, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Cassandra L. Hicks is designated officer of the Commission (Public Representative) to represent the interests of the general public.

5. The Secretary shall arrange for publication of this notice and order in the **Federal Register**.

PROCEDURAL SCHEDULE

July 26, 2011	Filing of Appeal.
August 10, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
August 10, 2011	Deadline for the Postal Service to file any responsive pleading.
August 22, 2011	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
August 30, 2011	Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).
September 19, 2011	Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)).
October 4, 2011	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).
October 11, 2011	Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (*see* 39 CFR 3001.116).
November 16, 2011	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)).

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2011–19576 Filed 8–2–11; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64981; File No. SR–BX–2011–046]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX BX, Inc. To Amend the BOX Fee Schedule

July 28, 2011.

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 July 15, 2011, NASDAQ OMX BX, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Fee Schedule of the Boston Options Exchange Group, LLC (''BOX''). While changes to the BOX Fee Schedule pursuant to this proposal will be effective upon filing, the changes will become operative on August 1, 2011. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room, on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings* and on the Commission's Web site at *http://www.sec.gov.*

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

Fees and Credits in Section 7

Currently, Section 7d of the BOX Fee Schedule specifies a $0.30 credit and fee for transactions in the BOX Price Improvement Period (''PIP''). These credits and fees apply equally to all account types, whether Public Customer, Broker Dealer or Market Maker, and across options classes, both those within the Penny Pilot program and those not in the Penny Pilot program (''Non-Penny classes''), and are in addition to any applicable trading fees, as described in Sections 1 through 3 of the BOX Fee Schedule.

The Exchange proposes to increase the existing credits and fees within Section 7d for PIP transactions in Non-Penny classes, and in Penny Pilot classes (other than QQQQ, SPY, and IWM) where the trade price is equal to or greater than $3.00, from $0.30 to $0.75. Further, the Exchange proposes to add corresponding provisions and clarifying language to Section 7d of the BOX Fee Schedule to specify that the fee and credit for all PIP transactions will remain $0.30: (1) In QQQQ, SPY, and IWM; and (2) in all other Penny Pilot Classes where the trade price is less than $3.00.[5]

The proposed increase in credits and fees for the specified PIP transactions is designed to provide all BOX market participants an additional incentive to submit their customer orders to the PIP and allow those orders the opportunity to benefit from its potential price improvement. BOX believes that the change to PIP transaction fees and credits are competitive, fair and reasonable, and non-discriminatory in that they apply to all categories of participants and across all account types. Additionally, BOX believes the

[5] *See* BOX Trading Rules Chapter V, Section 6(b). For the QQQQs, SPR, and IWM, the minimum trading increment for all options contracts will be one cent, and that for all classes in the Penny Pilot trading at less than $3.00 per option, the minimum trading increment shall be one cent.

proposed change to the PIP fees and credits is fair and reasonable as applied only to the specified classes and transactions because such options trade at minimum increments of $.05 or $.10, providing greater opportunity for market participants to offer additional price improvement. BOX believes that the opportunity for additional price improvement provided by these wider spreads merits offering more inducement for market participants to increase the price improvement for customer orders in these PIP transactions.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[6] in general, and Section 6(b)(4) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes the proposal is an equitable allocation of reasonable fees and other charges among BOX Options Participants. The Exchange also believes that there is an equitable allocation of reasonable credits among BOX Options Participants.

The Exchange believes that it is equitable to provide a credit to any Participant that removes liquidity through the PIP on behalf of its customer. The Exchange believes this credit will attract additional order flow to BOX and to the PIP in particular, to the benefit of all market participants. The Exchange believes that it is an equitable allocation of the fees and credits for PIP transactions because such fees and credits apply uniformly to all categories of participants and across all account types in the PIP. As stated above, the Exchange believes the proposed change to the PIP fees and credits is fair as applied only to the specified classes and transactions because such options trade at minimum increments of $.05 or $.10, providing greater opportunity for market participants to offer price improvement. The Exchange believes it is fair to offer an additional incentive to market participants to provide price improvement in these PIP transactions. These options classes trade at minimum increments of $.05 or $.10, providing greater opportunity for market participants to offer price improvement. BOX believes that the opportunity for additional price improvement provided by these wider spreads merits offering more inducement for market participants to increase the price improvement for customer orders in these PIP transactions. The Exchange believes that customer orders in these PIP transactions will benefit from this proposed change. All market participants that trade within the PIP, and all PIP transactions will continue to be subject to the fees and credits in Section 7 of the BOX Fee Schedule.

Further, the Exchange believes the proposed fees and credits related to the specified PIP transactions to be reasonable. BOX operates within a highly competitive market in which market participants can readily direct order flow to any of eight other competing venues if they deem fee levels at a particular venue to be excessive. The changes to BOX credits and fees proposed by this filing are intended to attract order flow to BOX by offering incentives to all market participants to submit their orders to the PIP for potential price improvement. BOX notes that this proposed rule change will increase both the fees and credit for these PIP transactions. The result is that BOX will collect a $0.75 fee from Participants that add liquidity in Non-Penny classes and PIP transactions in Penny classes, other than QQQQ, SPY, and IWM, where the trade price is equal to or greater than $3.00 and credit another Participant $0.75 for removing liquidity in the same transactions. Stated otherwise, the fees collected will not necessarily result in additional revenue to BOX, but will simply allow BOX to provide the credit incentive to Participants to attract additional order flow to the PIP. BOX believes it is appropriate to provide incentives to market participants to use PIP, resulting in potential benefit to customers through potential price improvement, and to all market participants from greater liquidity.

In particular, the proposed change will allow the fees charged on BOX to remain competitive with other exchanges as well as apply such fees in a manner which is equitable among all BOX Participants. The Exchange believes that the PIP transaction fees and credits it assesses are fair and reasonable and must be competitive with fees and credits in place on other exchanges. Further, the Exchange believes that this competitive marketplace impacts the fees and credits present on BOX today and influences the proposal set forth above.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act[8] and Rule 19b–4(f)(2) thereunder,[9] because it establishes or changes a due, fee, or other charge applicable only to a member.

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 the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further 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. In addition, the Commission seeks comment generally on (1) whether the proposed increases to the fees and credits for specified PIP transactions are consistent with Section 6(b)(8) of the Act, which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, and (2) whether the proposed fees are equitable as that term is used in Section 6(b)(4) of the Act, and not unfairly discriminatory as that term is used in Section 6(b)(5) of the Act. The Commission notes that a commenter on previous proposals by the Exchange relating to these same fees and credits argued that the Exchange's fee structure discriminates against PIP auction responders in favor of PIP auction initiators.[10] According to this commenter, the net cost to a responder is much more than the net cost to a PIP initiator because initiators may receive

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

[10] *See* Letters to Elizabeth M. Murphy, Secretary, Commission, from John C. Nagel, Managing Director and General Counsel, Asset Management and Markets, Citadel LLC, dated August 30, 2010 and May 3, 2011.

a credit for removing liquidity when a customer order is executed in the PIP, but no such credit is available to responders. As a result of these comparatively higher fees, according to this commenter, competitive responders will be less likely to participate in the PIP and will participate less aggressively when they do participate, thus burdening competition and reducing the likelihood and size of price improvement in the PIP. Do you agree with this commenter? Please explain why or why not.

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–BX–2011–046 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2011–046. 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, NW., 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 the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2011–046 and should be submitted on or before August 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19563 Filed 8–2–11; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64988; File No. SR–NYSE–2011–36]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending the Definition of Approved Person To Exclude Foreign Affiliates, Creating a New Definition of ''Foreign Securities Affiliate,'' Eliminating the Application Process for Approved Persons, and Making Related Technical and Conforming Changes

July 29, 2011.

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 July 15, 2011, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially 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 the definition of approved person to exclude foreign affiliates, create a new definition of ''foreign securities affiliate,'' eliminate the application process for approved persons, and make related technical and conforming changes. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the definition of approved person to exclude foreign affiliates, create a new definition of ''foreign securities affiliate,'' eliminate the application process for approved persons, and make related technical and conforming changes. Following approval of the proposed rule change, the Exchange will advise member organizations of the implementation date of the rule change via Information Memo.

Background

The current rules governing the definition of and application process for an approved person are NYSE Rules 2 and 304.[4] If the definition requirements under NYSE Rule 2 are met, then the person or entity has to apply to the Exchange for approval to register as an approved person. This requirement is intended to bring certain affiliates of Exchange member organizations within the Exchange's jurisdiction and to subject such affiliates' activities to Exchange rules to the extent their activities are related to the activities of the member organization.

NYSE Rule 2(c) defines the term ''approved person'' as ''a person, other than a member, principal executive or employee of a member organization, who controls a member organization or is engaged in a securities or kindred business that is controlled by or under common control with a member or member organization who has been approved by the Exchange as an approved person.'' NYSE Rule 2(d) further defines ''person'' to include not only natural persons, but also

[4] NYSE Amex LLC has filed a companion rule filing to conform its Equities Rules to the changes proposed in this filing. *See* SR–NYSEAmex–2011–54.

corporations, limited liability companies, partnerships, associations and other organized groups of persons. NYSE Rule 2(e) defines the term ''control'' to mean the power to direct or cause the direction of management or policies, whether through ownership of securities, by contract or otherwise, and creates a rebuttable presumption of control if the person has a right to vote 25 percent or more of the voting securities, is entitled to receive 25 percent or more of the net profits, or is a director, general partner, or principal executive of the member organization. NYSE Rule 2(f) defines ''engage in a securities or kindred business'' to mean transacting business as a broker or dealer in securities. Thus, the current definition of approved person includes a foreign affiliate of a member organization that is engaged in a broker-dealer business, but does not include, for example, a registered investment company. NYSE Rules 2A(e) and (f) further provide that the Exchange has jurisdiction after notice and a hearing to discipline approved persons in connection with the member organization's business and has jurisdiction over any and all other functions of approved persons in connection with the member organization's business in order for the Exchange to comply with its statutory obligation as a self-regulatory organization (''SRO'').

NYSE Rules 304 and 311(a) require, with limited exceptions, that persons who meet the NYSE Rule 2(c) definition of an approved person must apply for approval by the Exchange as an approved person. NYSE Rule 304 further provides that no person may become or remain an approved person unless such person meets the standards prescribed in the Exchange's rules, and it prescribes the process that an applicant must follow to become an approved person. Among other things, this process involves submission to the Exchange of a completed Form AP–1 (in the case of a corporation or other legal entity) or Forms AD–G 2 and AD–G 3 (in the case of a natural person, collectively referred to as ''AD–G''), and other pertinent information regarding the candidate for approval. By executing the Form AP–1 or AD–G, as applicable, the approved person affirmatively consents to the Exchange's jurisdiction.

Proposed Rule Change

The Exchange proposes to amend the definition of approved person to exclude certain foreign affiliates because the Exchange believes that the current definition is overbroad and it is unnecessary to assert jurisdiction over a foreign affiliate of a member organization that does not control a member organization. The Exchange notes that excluding such foreign affiliates from its jurisdiction would be consistent with Rule 19g2–1 under the Securities Exchange Act of 1934, as amended (the ''Act''), which provides that an exchange is not required to enforce compliance with its rules against certain persons;[5] the Exchange has not identified a rule of any other SRO that asserts jurisdiction over a foreign affiliate under common control with a member of that SRO. As such, the Exchange proposes to amend the definition of approved person so that it would include any person, other than a member, principal executive or employee of a member organization, who controls a member organization, is engaged in a securities or kindred business that is controlled by a member or member organization, or is a U.S. registered broker-dealer under common control with a member organization.

By changing the definition of approved person to exclude certain foreign affiliates, the Exchange does not intend to eliminate controls in Exchange rules related to potential conflicts of interest associated with having a foreign affiliate under common control with a member organization. Accordingly, the Exchange proposes to add a new defined term to Rule 2, ''foreign securities affiliate,'' which includes foreign persons not registered as a broker dealer in the United States that are in a securities or kindred business and that are under common control with a member organization. The Exchange proposes to insert the term ''foreign securities affiliate'' in Rules 21, 22, 91, 92, 96, 98A, 112, 304, 402, 422, 410A, 460, and 1301, so that the coverage of such rules remains the same following the proposed rule change. For example, Rule 21 seeks to eliminate conflicts of interests associated with reviewing decisions related to listing of securities at the Exchange. By including the proposed new definition of ''foreign securities affiliates,'' the scope of the rule remains unchanged, notwithstanding the proposed new definition of ''approved persons'' to exclude foreign affiliates under common control with a member organization.

The Exchange also proposes to amend its rules to remove the requirement that the Exchange affirmatively approve each application to become an approved person. If a person meets the definition of an approved person, as proposed, the Exchange will obtain jurisdiction by consent as described below. The Exchange believes that the current application process requires the submission of a substantial amount of information and documents related to member organization affiliates that is unnecessary to carry out the Exchange's regulatory responsibilities. In particular, because the Exchange is no longer the Designated Examining Authority (''DEA'') for Exchange member organizations,[6] the Exchange does not believe that it needs to engage in a detailed financial review of approved persons of its member organization applicants. The Exchange further notes that other SROs do not require that such persons undergo such an application and approval process.[7] The Exchange, therefore, proposes to remove all references to an approval process and the submission of an application for such approval from NYSE Rules 2, 304, 308, and 311. The Exchange also would eliminate use of the Forms AP–1 and AD–G.

Nevertheless, the Exchange's jurisdiction over approved persons in accordance with the revised definition would remain. Thus, the Exchange

[5] *See* 17 CFR 240.19g2–1. Under Rule 19g2–1, a national securities exchange is not required to enforce compliance, within the meaning of Section 19(g) of the Act, with the Act and the rules and regulations thereunder, with respect to persons associated with a member, other than securities persons or persons who control a member. Under Rule 19g2–1(b)(1), a ''securities person'' is defined as a ''person who is a general partner or officer (or person occupying a similar status or performing similar functions) or employee of a member; *provided, however,* that a registered broker or dealer which controls, is controlled by, or is under common control with, the member and the general partners and officers (and persons occupying similar status or performing similar functions) and employees of such a registered broker or dealer shall be securities persons if they effect, directly or indirectly, transactions in securities through the member by use of facilities maintained or supervised by such exchange or association.'' A foreign broker-dealer not registered in the United States that is under common control with an NYSE member organization and that is not a general partner or officer (or person occupying similar status or performing similar functions) or employee of a member, falls outside of the definition of ''securities person.''

[6] Prospective member organization applicants must be either a member of FINRA or, if the applicant does not transact business with public customers or conduct business on the Floor of the Exchange, a member of another registered securities exchange, before being approved as an Exchange member organization. *See* NYSE Rule 2(b)(i). Generally, FINRA or the other exchange already is, or will be, designated as the DEA under SEC Rule 17d–1 and the Exchange will not be designated as such. Currently, the Exchange is not the DEA for any of its member organizations, but if it were designated as the DEA, the Exchange has retained FINRA to perform services related to meeting the Exchange's DEA responsibilities for a member organization.

[7] For example, the rules of FINRA and The NASDAQ Stock Market, Inc. do not impose application and approval requirements on member affiliates. *See also* note 9, *infra.*

proposes to amend NYSE Rule 304 to provide specifically that a member organization would be required to identify all of its foreign securities affiliates and approved persons to the Exchange and each such approved person would be required to consent to the Exchange's jurisdiction, which is consistent with the obligations currently imposed on approved persons. The provisions of the current NYSE Rule 304(e)(2)–(4) that require an approved person to agree to (i) Inform the Exchange of any statutory disqualification of the approved person under Section 3(a)(39) of the Act, (ii) abide by the Rules of the Exchange relating to approved persons, and (iii) permit examination by the Exchange, or any person designated by it, of its books and records to verify the accuracy of the information required to be supplied under Exchange Rules, would be retained in proposed Rule 304.[8]

The focus on identification of affiliates and approved persons by each member organization and consent to jurisdiction by each approved person, instead of review and approval of applications by the Exchange, would make the entire process more efficient while maintaining appropriate regulatory standards. The proposed rule change would remove unnecessary paperwork in the process while holding each member organization accountable for identifying to the Exchange its affiliates and approved persons. The remaining jurisdictional requirements for approved persons would enable the Exchange to continue to pursue matters involving or affecting its member organizations.[9]

The Exchange also proposes to make technical and conforming changes to other rules that reference the approved person application process.[10] The Exchange further proposes to make technical amendments to replace the term ''allied member'' with ''principal executive'' in Rules 21, 22, 91, 96, 112, 304, 308, 410A, 422, 460, and 1301 and NYSE Rule Interpretation for Rule 304, delete ''allied member'' from Rule 304A, and delete NYSE Rule Interpretation for Rule 304A entirely; the Exchange replaced the term ''allied member'' with the term ''principal executive'' in an earlier rule filing and the proposed amendments are consistent with the previous rule filing.[11]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[12] of the Act, in general, and furthers the objectives of Section 6(b)(5)[13] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. More specifically, the NYSE believes that the proposed approved person definition and consent to jurisdiction process would remove unnecessary complexities and excessive informational requirements and create a more efficient and less burdensome process for membership applicants and member organizations while maintaining appropriate regulatory standards. As such, the proposed rule change would contribute to removing impediments to and perfecting the mechanism of a free and open market and a national market system.

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 (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the 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–NYSE–2011–36 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2011–36. 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

[8] The Exchange proposes to eliminate the text in current Rule 304(e)(1), which requires an approved person to supply information concerning its relationship with the member organization. This provision relates to information required to be submitted on Form AP–1 or AD–G, and as such it is not necessary to retain it in proposed Rule 304.

[9] The Exchange notes that FINRA is in the process of harmonizing legacy NASD and NYSE Rules, and has published a proposal to harmonize membership rules. *See* FINRA Regulatory Notice 10–01. While FINRA has proposed that a member firm be required to provide certain information about affiliates, FINRA has not proposed to adopt the approved person definition or application process, or assert jurisdiction over such persons. When FINRA completes that harmonization process for the membership rules, the Exchange will consider whether further amendments to its approved person rules are advisable. Until such time, the Exchange believes that the narrowing of the approved person definition and the elimination of the approved person application process will remove unnecessary complexities and excessive informational requirements and thereby reduce burdens on membership applicants and member organizations while still maintaining high regulatory standards consistent with the Act.

[10] Specifically, the Exchange proposes to clarify Rule 98A, which provides that no issuer, or partner or subsidiary thereof, may become an approved person of a Designated Market Maker unit that is registered in the stock of that issuer. Because an entity is an approved person by virtue of status, as described above, the Exchange proposes to clarify the meaning of the Rule by amending it to provide that a DMM unit may not be registered in a stock of an issuer, or a partner or subsidiary thereof, if such entity is an approved person of the DMM unit's member organization. Finally, the Exchange proposes to amend Rule 476A, which addresses minor rule violations, to correct a citation to Rule 304.

[11] *See* Securities Exchange Act Release No. 58549 (September 15, 2008), 73 FR 54444 (September 19, 2008) (SR–NYSE–2008–80).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

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 printing and viewing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549–1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *http://www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2011–36 and should be submitted on or before August 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19647 Filed 8–2–11; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64987; File No. SR–NYSEAMEX–2011–54]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing of Proposed Rule Change Amending the Definition of Approved Person To Exclude Foreign Affiliates, Creating a New Definition of ''Foreign Securities Affiliate,'' Eliminating the Application Process for Approved Persons, and Making Related Technical and Conforming Changes

July 29, 2011.

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 July 15, 2011, NYSE Amex LLC (the ''Exchange'' or ''NYSE Amex'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 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 the definition of approved person to exclude foreign affiliates, create a new definition of ''foreign securities affiliate,'' eliminate the application process for approved persons, and make related technical and conforming changes. 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the definition of approved person to exclude foreign affiliates, create a new definition of ''foreign securities affiliate,'' eliminate the application process for approved persons, and make related technical and conforming changes. Following approval of the proposed rule change, the Exchange will advise member organizations of the implementation date of the rule change via Information Memo.

Background

The current rules governing the definition of and application process for an approved person are NYSE Amex Equities Rules 2 and 304.[4] If the definition requirements under NYSE Amex Equities Rule 2 are met, then the person or entity has to apply to the Exchange for approval to register as an approved person. This requirement is intended to bring certain affiliates of Exchange member organizations within the Exchange's jurisdiction and to subject such affiliates' activities to Exchange rules to the extent their activities are related to the activities of the member organization.

NYSE Amex Equities Rule 2(c) defines the term ''approved person'' as ''a person, other than a member, principal executive or employee of a member organization, who controls a member organization or is engaged in a securities or kindred business that is controlled by or under common control with a member or member organization who has been approved by the Exchange as an approved person.'' NYSE Amex Equities Rule 2(d) further defines ''person'' to include not only natural persons, but also corporations, limited liability companies, partnerships, associations and other organized groups of persons. NYSE Amex Equities Rule 2(e) defines the term ''control'' to mean the power to direct or cause the direction of management or policies, whether through ownership of securities, by contract or otherwise, and creates a rebuttable presumption of control if the person has a right to vote 25 percent or more of the voting securities, is entitled to receive 25 percent or more of the net profits, or is a director, general partner, or principal executive of the member organization. NYSE Amex Equities Rule 2(f) defines ''engage in a securities or kindred business'' to mean transacting business as a broker or dealer in securities. Thus, the current definition of approved person includes a foreign affiliate of a member organization that is engaged in a broker-dealer business, but does not include, for example, a registered investment company. NYSE Amex Equities Rules 2A(e) and (f) further provide that the Exchange has jurisdiction after notice and a hearing to discipline approved persons in connection with the member organization's business and has jurisdiction over any and all other functions of approved persons in connection with the member organization's business in order for the Exchange to comply with its statutory obligation as a self-regulatory organization (''SRO'').

NYSE Amex Equities Rules 304 and 311(a) require, with limited exceptions, that persons who meet the NYSE Amex Equities Rule 2(c) definition of an approved person must apply for approval by the Exchange as an approved person. NYSE Amex Equities Rule 304 further provides that no person may become or remain an approved

[4] NYSE has filed a companion rule filing to conform its Equities Rules to the changes proposed in this filing. *See* SR–NYSE–2011–36.

person unless such person meets the standards prescribed in the Exchange's rules, and it prescribes the process that an applicant must follow to become an approved person. Among other things, this process involves submission to the Exchange of a completed Form AP–1 (in the case of a corporation or other legal entity) or Forms AD–G2 and AD–G3 (in the case of a natural person, collectively referred to as ''AD–G''), and other pertinent information regarding the candidate for approval. By executing the Form AP–1 or AD–G, as applicable, the approved person affirmatively consents to the Exchange's jurisdiction.

Proposed Rule Change

The Exchange proposes to amend the definition of approved person to exclude certain foreign affiliates because the Exchange believes that the current definition is overbroad and it is unnecessary to assert jurisdiction over a foreign affiliate of a member organization that does not control a member organization. The Exchange notes that excluding such foreign affiliates from its jurisdiction would be consistent with Rule 19g2–1 under the Securities Exchange Act of 1934, as amended (the ''Act''), which provides that an exchange is not required to enforce compliance with its rules against certain persons;[5] the Exchange has not identified a rule of any other SRO that asserts jurisdiction over a foreign affiliate under common control with a member of that SRO. As such, the Exchange proposes to amend the definition of approved person so that it would include any person, other than a member, principal executive or employee of a member organization, who controls a member organization, is engaged in a securities or kindred business that is controlled by a member or member organization, or is a U.S. registered broker-dealer under common control with a member organization.

By changing the definition of approved person to exclude certain foreign affiliates, the Exchange does not intend to eliminate controls in Exchange rules related to potential conflicts of interest associated with having a foreign affiliate under common control with a member organization. Accordingly, the Exchange proposes to add a new defined term to NYSE Amex Equities Rule 2, ''foreign securities affiliate,'' which includes foreign persons not registered as a broker dealer in the United States that are in a securities or kindred business and that are under common control with a member organization. The Exchange proposes to insert the term ''foreign securities affiliate'' in NYSE Amex Equities Rules 22, 91, 92, 96, 98A, 112, 304, 402, 410A, 422, and 460, so that the coverage of such rules remains the same following the proposed rule change. For example, NYSE Amex Equities Rule 22 seeks to eliminate conflicts of interests relating to personal interests. By including the proposed new definition of ''foreign securities affiliates,'' the scope of the rule remains unchanged, notwithstanding the proposed new definition of ''approved persons'' to exclude foreign affiliates under common control with a member organization.

The Exchange also proposes to amend its rules to remove the requirement that the Exchange affirmatively approve each application to become an approved person. If a person meets the definition of an approved person, as proposed, the Exchange will obtain jurisdiction by consent as described below. The Exchange believes that the current application process requires the submission of a substantial amount of information and documents related to member organization affiliates that is unnecessary to carry out the Exchange's regulatory responsibilities. In particular, because the Exchange is no longer the Designated Examining Authority (''DEA'') for Exchange member organizations,[6] the Exchange does not believe that it needs to engage in a detailed financial review of approved persons of its member organization applicants. The Exchange further notes that other SROs do not require that such persons undergo such an application and approval process.[7] The Exchange, therefore, proposes to remove all references to an approval process and the submission of an application for such approval from NYSE Amex Equities Rules 2, 304, 308, and 311. The Exchange also would eliminate use of the Forms AP–1 and AD–G.

Nevertheless, the Exchange's jurisdiction over approved persons in accordance with the revised definition would remain. Thus, the Exchange proposes to amend NYSE Amex Equities Rule 304 to provide specifically that a member organization would be required to identify all of its foreign securities affiliates and approved persons to the Exchange and each such approved person would be required to consent to the Exchange's jurisdiction, which is consistent with the obligations currently imposed on approved persons. The provisions of the current NYSE Amex Equities Rule 304(e)(2)–(4) that require an approved person to agree to (i) Inform the Exchange of any statutory disqualification of the approved person under Section 3(a)(39) of the Act, (ii) abide by the Rules of the Exchange relating to approved persons, and (iii) permit examination by the Exchange, or any person designated by it, of its books and records to verify the accuracy of the information required to be supplied under Exchange Rules, would be retained in proposed Amex Equities Rule 304.[8]

The focus on identification of affiliates and approved persons by each member organization and consent to jurisdiction by each approved person, instead of review and approval of applications by the Exchange, would make the entire process more efficient while maintaining appropriate regulatory standards. The proposed rule change would remove unnecessary paperwork in the process while holding each member organization accountable

[5] *See* 17 CFR 240.19g2–1. Under Rule 19g2–1, a national securities exchange is not required to enforce compliance, within the meaning of Section 19(g) of the Act, with the Act and the rules and regulations thereunder, with respect to persons associated with a member, other than securities persons or persons who control a member. Under Rule 19g2–1(b)(1), a ''securities person'' is defined as a ''person who is a general partner or officer (or person occupying a similar status or performing similar functions) or employee of a member; *provided, however,* that a registered broker or dealer which controls, is controlled by, or is under common control with, the member and the general partners and officers (and persons occupying similar status or performing similar functions) and employees of such a registered broker or dealer shall be securities persons if they effect, directly or indirectly, transactions in securities through the member by use of facilities maintained or supervised by such exchange or association.'' A foreign broker-dealer not registered in the United States that is under common control with an NYSE Amex member organization and that is not a general partner or officer (or person occupying similar status or performing similar functions) or employee of a member, falls outside of the definition of ''securities person.''

[6] Prospective member organization applicants must be either a member of FINRA or, if the applicant does not transact business with public customers or conduct business on the Floor of the Exchange, a member of another registered securities exchange, before being approved as an Exchange member organization. *See* NYSE Amex Equities Rule 2(b)(i). Generally, FINRA or the other exchange already is, or will be, designated as the DEA under SEC Rule 17d–1 and the Exchange will not be designated as such. Currently, the Exchange is not the DEA for any of its member organizations, but if it were designated as the DEA, the Exchange has retained FINRA to perform services related to meeting the Exchange's DEA responsibilities for a member organization.

[7] For example, the rules of FINRA and The NASDAQ Stock Market, Inc. do not impose application and approval requirements on member affiliates. *See also* note 9, *infra.*

[8] The Exchange proposes to eliminate the text in current NYSE Amex Equities Rule 304(e)(1), which requires an approved person to supply information concerning its relationship with the member organization. This provision relates to information required to be submitted on Form AP–1 or AD–G, and as such it is not necessary to retain it in proposed NYSE Amex Equities Rule 304.

for identifying to the Exchange its affiliates and approved persons. The remaining jurisdictional requirements for approved persons would enable the Exchange to continue to pursue matters involving or affecting its member organizations.[9]

The Exchange also proposes to make technical and conforming changes to other rules that reference the approved person application process.[10] The Exchange further proposes to make technical amendments to correct an error in the spelling of ''principal executive,'' which is spelled ''principle executive'' in NYSE Amex Rule 476A and NYSE Amex Equities Rules 308, 410A, 422, and 460; the Exchange replaced the term ''allied member'' with the term ''principal executive'' in an earlier rule filing at which time some of the NYSE Amex Rules contained the improper spelling.[11] In addition, the Exchange proposes to delete ''principle executive'' from NYSE Amex Equities Rules 304 and 304A for consistency with similar amendments to NYSE Rules 304 and 304A.[12]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[13] of the Act, in general, and furthers the objectives of Section 6(b)(5)[14] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. More specifically, the Exchange believes that the proposed approved person definition and consent to jurisdiction process would remove unnecessary complexities and excessive informational requirements and create a more efficient and less burdensome process for membership applicants and member organizations while maintaining appropriate regulatory standards. As such, the proposed rule change would contribute to removing impediments to and perfecting the mechanism of a free and open market and a national market system.

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 (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the 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–NYSEAMEX–2011–54 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–NYSEAMEX–2011–54. 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 20549–1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *http://www.nyse.com.* 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–NYSEAMEX–2011–54 and should be submitted on or before August 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19646 Filed 8–2–11; 8:45 am]

BILLING CODE 8011–01–P

[9] The Exchange notes that FINRA is in the process of harmonizing legacy NASD and NYSE Amex Equities Rules, and has published a proposal to harmonize membership rules. *See* FINRA Regulatory Notice 10–01. While FINRA has proposed that a member firm be required to provide certain information about affiliates, FINRA has not proposed to adopt the approved person definition or application process, or assert jurisdiction over such persons. When FINRA completes that harmonization process for the membership rules, the Exchange will consider whether further amendments to its approved person rules are advisable. Until such time, the Exchange believes that the narrowing of the approved person definition and the elimination of the approved person application process will remove unnecessary complexities and excessive informational requirements and thereby reduce burdens on membership applicants and member organizations while still maintaining high regulatory standards consistent with the Act.

[10] Specifically, the Exchange proposes to clarify NYSE Amex Equities Rule 98A, which provides that no issuer, or partner or subsidiary thereof, may become an approved person of a Designated Market Maker unit that is registered in the stock of that issuer. Because an entity is an approved person by virtue of status, as described above, the Exchange proposes to clarify the meaning of the Rule by amending it to provide that a DMM unit may not be registered in a stock of an issuer, or a partner or subsidiary thereof, if such entity is an approved person of the DMM unit's member organization. Finally, the Exchange proposes to amend NYSE Amex Rule 476A, which addresses minor rule violations, to correct a citation to NYSE Amex Equities Rule 304.

[11] *See* Securities Exchange Act Release No. 58549 (September 15, 2008), 73 FR 54444 (September 19, 2008) (SR–NYSE–2008–80).

[12] *See* SR–NYSE–2011–36.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64985; File No. SR–CHX–2011–21]

Self-Regulatory Organizations; Chicago Stock Exchange, Incorporated; Notice of Filing of Proposed Rule Change To Amend Article 20, Rule 9 (Cancellation of Transactions) and Interpretation and Policy .01 Thereunder Regarding the Cancellation of the Stock Leg of Stock-Option Transactions Done on the Exchange

July 28, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 26, 2011, Chicago Stock Exchange, Incorporated (''Exchange'' or ''CHX'') 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 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 Article 20, Rule 9 (Cancellation of Transactions) and Interpretation and Policy .01 thereunder regarding the cancellation of the stock leg of stock-option transactions done on the Exchange. The text of this proposed rule change is available on the Exchange's Web site at (*http://www.chx.com*), at the Exchange's Office of the Secretary and in 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 CHX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend CHX Article 20, Rule 9 (Cancellation of Transactions) and Interpretation and Policy .01 thereunder in order to expand the circumstances in which the stock leg of a combination stock-option order may be cancelled and make related modifications. Currently, under Interpretation and Policy .01, the stock leg of stock-option order can be cancelled only if market conditions in the options exchange prevented the execution of the options leg at the price agreed upon by the parties to the options transaction. We propose to move the text of the current Interpretation and Policy .01 to a separate section of Rule 9, since the Exchange believes that the requirements of that Interpretation and Policy constitute an independent basis for the cancellation of transactions, rather than act as an interpretation of the general provisions of current Rule 9.[3]

Through this filing, the Exchange proposes to expand the circumstances in which transactions executed on the CHX's facilities may be cancelled pursuant to provisions applicable only to combination stock-option orders to include situations in which the options leg is executed, but subsequently cancelled by the options exchange pursuant to their rules. In such circumstances, the cancellation of the stock leg at the request of the parties thereto is substantially similar to situations when the options trade is not executed at all. Otherwise, the parties would be left with an unwanted stock position, which was a hedge on or otherwise a component of the now-cancelled options transaction.[4] The expansion of the authority to cancel transactions would permit a CHX Participant to cancel the unwanted stock leg of a stock-option order if the options trade was cancelled without having to resort to the open market to liquidate the stock leg.

The Exchange also proposes to require that any proposed cancellation of a transaction involving a stock-option order be made by or on behalf of all Participants to the transaction, rather than by any Participant. The Exchange believes that requiring all Participants to consent to the transaction will help prevent the possible abuse of the cancellation provisions by a single party acting unilaterally. The CHX understands that the ultimate parties to the cash equities transaction are the same parties to the equity options transaction, so any cancellation of the Exchange transaction will not have an impact on other market participants.[5] A special trade indicator will be reported by the Exchange to the Consolidated Tape in order that the parties and other market participants are aware that the transaction may be cancelled by the parties if the requirements of the rule are satisfied.

Finally, proposed Rule 9(b)(3) requires Participants acting as the broker in trades cancelled pursuant to proposed Rule 9(b)(1)(ii) to maintain records sufficient to establish that the options leg was in fact cancelled by the options exchange on which it was executed. Proposed Rule 9(b)(4) requires, among other things, that the Participant acting as broker on the trade identify the reason that the trade was cancelled. The Exchange will use such records to verify that the requirements imposed by the proposed rule changes have been met, and would treat the failure to properly document such cancellations as a rule violation subject to disciplinary treatment under Article 12 of the Exchange's rules.[6]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act in general,[7] and furthers the objectives of Section 6(b)(5)

[3] The Exchange proposes to renumber the text of existing Rule 9 as subsection (a) to that rule, while Interpretation and Policy .01 (with the modification proposed herein) will become section (b) of Rule 9.

[4] As noted in note 5 to the Commission's notice of filing of the Exchange's proposed addition of the stock-option cancellation interpretation, ''the stock leg of a stock-option order is always presented to the CHX participant with an identified buyer and seller who have agreed to the terms of the trade. Both buyer and seller are aware of the possibility that the stock leg of a stock-option order may be cancelled on the CHX if the corresponding options leg is cancelled on an options market. Because both the buyer and seller are identified when the stock leg is presented to the CHX, there is no possibility that another CHX member's order could be matched against a stock-option order. Accordingly, there is no risk that an investor's order could be involuntarily cancelled without notice to the investor. * * *'' Securities Exchange Rel. No. 34–54185 (July 20, 2006), 71 FR 42693 (July 27, 2006) (SR–CHX–2005–34).

[5] In some instances, the parties to the options transactions may not be Exchange Participants. The orders of such firms would be executed on the Exchange in the name of its clearing firm, which must be an Exchange Participant. The clearing firm would then allocate the transaction to the options firm.

[6] The Exchange represents that it will implement surveillance procedures reasonably designed to detect possible violations of these provisions simultaneous with the approval of the proposed rule changes.

[7] 15 U.S.C. 78f(b).

in particular,[8] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transaction in securities, to remove impediments and perfect the mechanisms of a free and open market, and, in general, to protect investors and the public interest by allowing CHX to amend its rules to permit the cancellation of previously executed stock trades which are a component of a combination stock-option order when the options exchange cancels the options leg of the transaction. By allowing the cancellation of the stock leg of a combination stock-option order when the parties desire that result, the proposed changes will assist in the efficient processing of such transactions. The cancellation of the stock leg in such circumstances should also result in lower fees to Exchange order senders, since they would otherwise have to pay additional transaction fees to execute an offsetting trade. Since the cancellation of a trade pursuant to the proposed rule changes eliminates the need for the parties to execute and report an offsetting trade, the proposal should bolster the integrity of the publicly disseminated trade reporting information by removing the need for duplicative trade reports. The ''double counting'' of the initial trade and a reported reversal of that trade could give an inaccurate impression of the amount of shares actually changing hands in the marketplace. Since the cancellation would only impact the parties to the options transaction, the proposed amendments would not impact other market participants which submit orders to the CHX's facilities for execution. Finally, permitting the cancellation of the stock leg when the options trade has been cancelled should reduce the credit risk to the parties involved in the transaction. Failure to cancel or offset the stock leg would leave the parties with an unwanted stock position, which was a hedge on or otherwise a component of the now-cancelled options transaction.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

[8] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the 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 No. SR–CHX–2011–21 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CHX–2011–21. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–2011–21 and should be submitted on or before August 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19690 Filed 8–2–11; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–[64982]; File No. SR–OCC–2011–08]

Self-Regulatory Organizations; Options Clearing Corporation; Notice of Filing of Proposed Rule Change to Provide Specific Authority to Use an Auction Process as One of the Means to Liquidate a Defaulting Clearing Member's Accounts

July 28, 2011.

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 July 14, 2011, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by OCC. 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 purpose of the proposed rule change is to provide OCC specific authority to use an auction process as

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

one of the means to liquidate a defaulting clearing member's accounts.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[3]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of this rule change is to revise OCC's rules to provide specific authority for OCC to use an auction process as one of the possible means by which OCC may liquidate a defaulting clearing member's accounts. An auction is likely to be the most efficient and orderly procedure practicable for closing out clearing member portfolios in some circumstances.

The liquidation of open long and short positions through exchange transactions is an obvious means of closing out the positions of a defaulting member. However, auctions are increasingly viewed as an efficient and cost effective alternative for liquidating some or all of a clearing member's positions and collateral, especially where the positions are very large or in unstable market conditions. As compared to liquidating positions through exchange transactions, an auction may usually be expected to result in a shorter liquidation period and reduced execution risk. During Lehman Brothers Holdings Inc.'s liquidation, clearinghouses such as LCH.Clearnet and CME Clearing liquidated certain derivatives positions through auctions.

Chapter XI of OCC's Rules, which governs the liquidation of a clearing member's accounts in the event of an insolvency, provides that open positions of a clearing member must be closed by OCC ''in the most orderly manner practicable.'' While OCC and its counsel believe that this language is broad enough to authorize a private auction, *i.e.,* an auction limited to selected bidders, as a means of closing out open positions, OCC also believes that explicit authorization for a private auction procedure could reduce the likelihood of a legal challenge should such a procedure be utilized.

The proposed change to OCC's rules is consistent with Section 17A of the Act, as amended (the ''Exchange Act''), because it is designed to promote the prompt and accurate clearance and settlement of security transactions, and generally protect investors and the public interest, by making more explicit OCC's ability to use an auction procedure to liquidate a defaulting clearing member's accounts. The proposed rule change is not inconsistent with the existing rules of OCC, including any other rules proposed to be amended.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. OCC will notify the Commission of any written comments received by OCC.

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 the 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 and with respect to the following:

- The Commission requests comment regarding the types of circumstances in which an auction would or would not be the most orderly procedure practicable for closing out clearing member portfolios. For example, in what circumstances would a private auction be a more or less orderly procedure than liquidating the defaulting member's positions on a national securities exchange?
- The Commission requests comment on whether a private auction limited to selected bidders could impose any burden on competition. In what ways, if any, would the effects on competition vary based on the types of firms that are allowed to participate in an auction and the method used to select such participants?

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commissions 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–OCC–2011–08 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–OCC–2011–08. 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 Section, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 pm. Copies of such filings will also be available for inspection and copying at the principal office of OCC and on OCC's Web site at *http://www.optionsclearing.com/components/docs/legal/rules_and_bylaws/sr_occ_11_08.pdf.*

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

[3] The Commission has modified the text of the summaries prepared by OCC.

submissions should refer to File Number SR–OCC–2011–08 and should be submitted on or before August 24, 2011.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[4]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19564 Filed 8–2–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64983; File No. SR–NASDAQ–2011–098]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt an ''All-or-None'' Order Type

July 28, 2011.

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 July 22, 2011, The NASDAQ Stock Market LLC (the ''Exchange'' or ''NASDAQ'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ is filing with the Securities and Exchange Commission (''Commission'') a proposal for the NASDAQ Options Market (''NOM'') to amend Chapter VI, Trading Systems, Section 1, Definitions, and Section 6, Acceptance of Quotes and Orders, to adopt an ''All-or-none'' order type, as described further below. The Exchange also proposes to amend the definition of ''Immediate or Cancel'' to accommodate market orders.

This change is scheduled to be implemented on NOM on or about September 1, 2011; the Exchange will announce the implementation schedule by Options Trader Alert, once the rollout schedule is finalized.

The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/*, at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to introduce a new order type to NOM and permit market orders to be designated as Immediate or Cancel orders. Specifically, an All-or-None order is a limit or market order that is to be executed in its entirety or not at all. All-or-None Orders will be treated as having a time-in-force designation of Immediate or Cancel, as described further below.[3] All-or-None Orders received prior to the opening cross or after market close will be rejected. The Exchange proposes to add this definition to its rules as new Section 1(e)(10). The Exchange also proposes to refer to All-or-None Orders in Section 6(a)(2) of its rules. Many options markets currently have all-or-none orders, and the definition of this new order type is consistent with the definitions contained in other exchanges' rules.[4]

The new All-or-None Order type is similar to the existing Minimum Quantity Order currently available on the Exchange. Minimum Quantity Orders are orders that require that a specified minimum quantity of contracts be obtained, or the order is cancelled.[5] Similar to the All-or-None Orders proposed herein, Minimum Quantity Orders may only be entered with a time-in-force designation of Immediate or Cancel. Today, a Minimum Quantity Order with the minimum set at the full size of the order would function the same as the proposed All-or-None Order.[6]

In addition, the Immediate or Cancel designation is currently only available to limit orders. The Exchange proposes to amend the definition of Immediate or Cancel in Section 1(g)(2) to delete the word ''limit'' in order to cover market orders; accordingly, market orders, including the proposed new All-or-None Orders, can now be Immediate or Cancel.[7]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of Section 6(b)(5) of the Act[9] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to 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, by mitigating risks to market participants. The Exchange believes that the proposal is appropriate and reasonable, because it offers an additional order type on NOM and Immediate or Cancel functionality for market orders. The Exchange believes that this should offer investors new trading opportunities on the Exchange and enhance the Exchange's competitive position.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect

[4] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* NOM Rules, Chapter VI, Section 1(g)(2).

[4] *See e.g.,* CBOE Rule 6.53(i); C2 Rule 6.10(c)(1) and ISE Rule 715(c).

[5] *See* NOM Rules, Chapter VI, Section 1(e)(3).

[6] A Minimum Quantity Order for 100 contracts with the minimum set at 100 contracts has the same result as an All-or-None Order for 100 contracts, because both can only trade against an order for 100 contracts.

[7] *See* NOM Rules, Chapter VI, proposed Section 1(g)(2).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6) [11] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2011–098 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2011–098. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–098 and should be submitted on or before August 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19612 Filed 8–2–11; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NASDAQ has satisfied this requirement.

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64984; File No. SR–FINRA–2011–035]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt FINRA Rules 2210 (Communications With the Public), 2212 (Use of Investment Companies Rankings in Retail Communications), 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings), 2214 (Requirements for the Use of Investment Analysis Tools), 2215 (Communications With the Public Regarding Security Futures), and 2216 (Communications With the Public About Collateralized Mortgage Obligations (CMOs)) in the Consolidated FINRA Rulebook

July 28, 2011.

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 July 14, 2011, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210–1 and 2210–3 through 2210–8 as FINRA Rules 2210 and 2212 through 2216, and to delete paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5), and 472.90, and Incorporated NYSE Rule Interpretations 472/01 and 472/03 through 472/11. The proposed rule change would renumber NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210–1 and 2210–4 as FINRA Rule 2210, NASD Interpretive Material 2210–3 as FINRA Rule 2212, NASD Interpretive Material 2210–5 as FINRA Rule 2213, NASD Interpretive Material 2210–6 as FINRA Rule 2214, NASD Interpretive Material 2210–7 as FINRA Rule 2215, and NASD Interpretive Material 2210–8 as FINRA Rule 2216.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

As part of the process of developing a new consolidated rulebook (''Consolidated FINRA Rulebook''),[3]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules

FINRA is proposing to adopt NASD Rules 2210 and 2211 and NASD Interpretive Materials 2210–1 and 2210–3 through 2210–8 as FINRA Rules 2210 and 2212 through 2216, and to delete paragraphs (a)(1), (i), (j) and (l) of Incorporated NYSE Rule 472, Incorporated NYSE Rule Supplementary Material 472.10(1), (3), (4) and (5), and 472.90, and Incorporated NYSE Rule Interpretations 472/01 and 472/03 through 472/11.

Current Rules Governing Communications With the Public

NASD Rules 2210 and 2211, and the Interpretive Materials that follow Rule 2210, generally govern all FINRA members' communications with the public. Incorporated NYSE Rule 472 governs communications with the public of members that also are members of the New York Stock Exchange.

NASD Rule 2210 divides communications into six separate categories, as follows:

➢ *Advertisement* generally includes written (including electronic) retail communications that do not have a limited audience, such as newspaper, magazine, television and radio advertisements, billboards and Web sites.

➢ *Sales literature* generally includes written (including electronic) retail communications that have a more targeted audience, such as brochures, performance reports, telemarketing scripts, seminar scripts and form letters.

➢ *Correspondence* includes written letters, electronic mail, instant messages and market letters sent to: (i) One or more existing retail customers; and (ii) fewer than 25 prospective retail customers within a 30 calendar-day period.

➢ *Institutional sales material* includes communications that are distributed or made available only to institutional investors. NASD Rule 2211 defines the term ''institutional investor'' generally to include registered investment companies, insurance companies, banks, registered broker-dealers, registered investment advisers, certain retirement plans, governmental entities, and individual investors and other entities with at least $50 million in assets.

➢ *Independently prepared reprint* includes reprints of articles from independent publications, as well as reports published by independent research firms.

➢ *Public appearance* includes unscripted participation in live events, such as interviews, seminars and call-in television and radio shows.

These definitions are important because the principal approval, filing and content standards apply differently to each category. For example, members generally must have a principal approve all advertisements, sales literature and independently prepared reprints prior to use. This pre-use approval requirement does not apply to: (1) Institutional sales material or (2) correspondence, unless it is sent to 25 or more existing retail customers within a 30 calendar-day period and includes an investment recommendation or promotes a product or service of the member. While such communications do not require principal pre-use approval, members still must establish and maintain policies and procedures to supervise them for compliance with applicable standards.

Members must file with the FINRA Advertising Regulation Department (''Department'') for review certain advertisements and sales literature. For example, advertisements and sales literature concerning investment companies, variable insurance products and public direct participation programs, and advertisements concerning government securities, must be filed within 10 business days of first use, but members are not required to file independently prepared reprints, correspondence or institutional sales material. The filing requirements also differ based on the member using the material and its content.

Members that previously have not filed advertisements with the Department must file all advertisements at least 10 business days prior to first use for a one-year period following the date the first advertisement was filed. Additionally, under NASD Rule 2210 and related Interpretive Materials, all members must file advertisements concerning collateralized mortgage obligations (''CMOs'') and security futures, and advertisements and sales literature concerning registered investment companies that include unpublished or self-created rankings or performance comparisons, at least 10 business days prior to first use, and must withhold them from publication until any changes specified by the Department have been made.

Incorporated NYSE Rule 472 requires an ''allied member, supervisory analyst or qualified person'' to approve prior to use each advertisement, sales literature or other similar type of communication.[4] The NYSE Rule 472 definitions of ''advertisement'' and ''sales literature'' are similar to those used in NASD Rule 2210.

The communications rules include both general and specific content standards. Certain general standards apply to all communications, such as requirements that communications be fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security, industry or service, and prohibitions on omitting material facts whose absence would make the communication misleading. More particular content standards apply to specific issues or securities.

Proposed Rule Change

Reorganization of Rules

The proposed rule change would create a new FINRA Rule 2210 that would encompass, subject to certain changes, the provisions of current NASD Rules 2210 and 2211, NASD Interpretive Materials 2210–1 and 2210–4, and the provisions of Incorporated NYSE Rule 472 that do not pertain to research analysts and research reports. Each of the other Interpretive Materials that follow NASD Rule 2210 would receive its own FINRA rule number and would adopt the same communication categories used in FINRA Rule 2210.[5]

Communication Categories

The proposed rule change would reduce the number of current communication categories from six to three, as follows:

➢ *Institutional communication* would include communications that fall within the current definition of ''institutional sales material'' under NASD Rule 2211(a)(2): Written (including electronic) communications that are distributed or made available only to institutional investors. ''Institutional investor'' generally would have the same definition as under NASD Rule 2211(a)(3).[6]

incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[4] NYSE Rule 472(a)(1).

[5] Proposed FINRA Rule 2211 (Communications with the Public About Variable Insurance Products), which would replace NASD Interpretive Material 2210–2, is the subject of a separate proposed rule change. *See* Securities Exchange Act Release No. 61107 (December 3, 2009), 74 FR 65180 (December 9, 2009) (Notice of Filing File No. SR–FINRA–2009–070).

[6] FINRA has modified the definition of ''institutional investor'' in proposed FINRA Rule

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➢ *Retail communication* would include any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period. ''Retail investor'' would include any person other than an institutional investor, regardless of whether the person has an account with the member.

➢ *Correspondence* would include any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period.

The proposal would eliminate the current definitions of ''advertisement,'' ''sales literature,'' ''institutional sales material,'' ''public appearance'' and ''independently prepared reprint'' in NASD Rule 2210, as well as all of the definitions in NASD Rule 2211.[7] The proposal also would eliminate the definitions of ''communication,'' ''advertisement,'' ''market letter'' and ''sales literature'' in Incorporated NYSE Rule 472.

Communications that currently qualify as advertisements and sales literature generally would fall under the definition of ''retail communication.'' In addition, to the extent that a member distributed or made available a communication that currently qualifies as an independently prepared reprint to more than 25 retail investors within a 30 calendar-day period, the communication also would fall under the definition of ''retail communication.'' Communications that currently qualify as ''institutional sales material'' would fall within the definition of ''institutional communication.'' Some communications that currently qualify as ''correspondence'' would continue to fall within that definition. However, communications sent to more than 25 retail investors within a 30 calendar-day period in all cases would be considered retail communications.[8]

Although the proposal would eliminate the terms ''public appearance'' and ''independently prepared reprint,'' as discussed below, the proposal would retain with respect to these communication categories much of the substance of the exceptions from the filing requirements and limited application of the content standards.

Approval, Review and Recordkeeping Requirements

Currently NASD Rule 2210(b)(1)(A) requires a registered principal of the member to approve each advertisement, item of sales literature and independently prepared reprint before the earlier of its use or filing with the Department. Proposed FINRA Rule 2210(b)(1)(A) would require an appropriately qualified registered principal of the member to approve each retail communication before the earlier of its use or filing with the Department. The principal registration required to approve particular communications would depend upon the permissible activities for each principal registration category.[9] The proposed rule change would eliminate Incorporated NYSE Rule 472(a)(1), which requires an ''allied member, supervisory analyst, or qualified person'' to approve in advance each advertisement, sales literature or other similar type of communication by an NYSE member firm.[10]

NASD Rule 2210(b)(1)(B) permits a Series 16 supervisory analyst approved pursuant to Incorporated NYSE Rule 344 to approve research reports on debt and equity securities.[11] Proposed FINRA Rule 2210(b)(1)(B) would continue this provision without substantive change.[12]

NASD Rule 2210(b)(1)(D) provides an exception from the principal approval requirements of NASD Rule 2210(b)(1)(A) for an advertisement, item of sales literature, or independently prepared reprint, if at the time that a member intends to publish or distribute it: (i) another member has filed it with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member using the communication in reliance on this exception has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter. Proposed FINRA Rule 2210(b)(1)(C) would preserve this exception for retail communications.

Proposed FINRA Rule 2210(b)(1)(D) would except from the principal approval requirements of proposed FINRA Rule 2210(b)(1)(A) three additional categories of retail communications, provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d). These communications include: (i) Any retail communication that is excepted from the definition of ''research report'' pursuant to NASD Rule 2711(a)(9)(A); (ii) any retail communication that is posted on an online interactive electronic forum; and (iii) any retail communication that does not make any financial or investment

2210 to clarify that the term includes multiple employee benefit plans and multiple qualified plans offered to employees of the same employer, provided that the plans in the aggregate have at least 100 participants. FINRA also has added a Supplementary Material to clarify that a member's internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member are considered institutional communications pursuant to paragraph (a)(3) of proposed FINRA Rule 2210. *See* proposed FINRA Rule 2210.01. Accordingly, such internal communications are subject to both the provisions of proposed FINRA Rule 2210 and NASD Rule 3010(d) (Review of Transactions and Correspondence). *See also* Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (Notice of Filing File No. SR–FINRA–2011–028) (proposing, among other things, to adopt NASD Rule 3010(d) as FINRA Rule 3110(b)(4), subject to certain changes).

[7] NASD Rule 2211 currently defines the terms ''correspondence,'' ''institutional sales material,'' ''institutional investor,'' ''existing retail customer,'' ''prospective retail customer'' and ''market letter.''

[8] The definition of ''correspondence'' in NASD Rule 2211 currently includes market letters as well as written letters and electronic mail messages that are sent to one or more existing retail customers and fewer than 25 prospective retail customers within a 30 calendar-day period. ''Market letter'' is defined to include any communication excepted from the definition of ''research report'' pursuant to NASD Rule 2711(a)(9)(A). *See* NASD Rule 2211(a)(5). FINRA revised the definition of ''correspondence'' to include market letters in February 2009 in order to allow members to send market letters to traders and other investors who base their decisions on timely market analysis without having to have a principal approve them in advance. Previously, members were required to approve market letters prior to use. *See Regulatory Notice* 09–10 (February 2009). Proposed FINRA Rule 2210 would continue to allow members to send retail communications that are excepted from the definition of ''research report'' pursuant to NASD Rule 2711(a)(9)(A) without having a registered principal approve the communication prior to use, provided that a member supervises and reviews such communications in the same manner as correspondence. *See* proposed FINRA Rule 2210(b)(1)(D).

[9] Currently NASD Rule 1022(g) permits a General Securities Sales Supervisor to approve sales literature as defined in NASD Rule 2210, but does not permit persons within this category to approve advertisements. FINRA separately sought comment on a proposal that would amend the General Securities Sales Supervisor registration category to remove the restriction on approving advertisements, and to permit persons within this registration category to approve retail communications as defined in proposed FINRA Rule 2210. *See Regulatory Notice* 09–70 (December 2009).

[10] The term ''allied member'' was largely deleted from the Incorporated NYSE Rules in 2008, and thus is not being carried over as part of proposed FINRA Rule 2210(b)(1)(A). *See Regulatory Notice* 08–64 (October 2008).

[11] FINRA separately sought comment on a proposal that would adopt a stand-alone permissive registration category for Supervisory Analysts. *See Regulatory Notice* 09–70 (December 2009).

[12] NASD Rule 2210(b)(1)(C) currently requires a registered principal qualified to supervise security futures activities to approve each advertisement or item of sales literature concerning security futures. This requirement would continue going forward with respect to retail communications concerning security futures. Nevertheless, this provision is being eliminated as redundant given the requirement under proposed FINRA Rule 2210(b)(1)(A) that an appropriately qualified principal approve each retail communication.

recommendation or otherwise promote a product or service of the member.

The first category generally carries forward a current exception from the principal pre-use approval requirements for market letters.[13] The second category codifies a current interpretation of the rules governing communications with the public that allows members to supervise communications posted on interactive electronic forums in the same manner as is required for supervising correspondence.[14] The third category broadens a current principal pre-use approval exception for correspondence that is sent to 25 or more existing retail customers within any 30 calendar-day period and that does not make any financial or investment recommendation or otherwise promote a product or service of the member.[15] Unlike the current principal pre-use approval exception, this exception would apply to all retail communications.[16]

Proposed FINRA Rule 2210(b)(1)(E) would allow FINRA, pursuant to the FINRA Rule 9600 Series, to grant an exemption from the principal approval requirements of paragraph (b)(1)(A) for good cause shown after taking into consideration all relevant factors, provided that the exemption is consistent with the purposes of FINRA Rule 2210, the protection of investors, and the public interest.

Proposed FINRA Rule 2210(b)(1)(F) would provide that, notwithstanding any other provision of FINRA Rule 2210, a registered principal must approve a communication prior to the member filing it with the Department. Currently NASD Rule 2210(b)(1)(A) requires a principal to approve an advertisement, item of sales literature or independently prepared reprint before the earlier of its use or filing with the Department. Proposed FINRA 2210(b)(1)(F) is intended to clarify that an appropriately qualified principal must approve *any* communication that is filed with the Department, even if a communication otherwise would come under an exception to the principal approval requirements of proposed FINRA Rule 2210(b)(1)(A).

NASD Rule 2211(b)(1) and NASD Rule 3010(d) impose certain supervisory and review requirements with regard to a member's correspondence and institutional sales material.[17] Proposed FINRA Rules 2210(b)(2) and (3) generally would maintain the supervision and review standards for correspondence and institutional communications that are currently found in NASD Rules 2211 and 3010(d).

Currently NASD Rule 2210(b)(2) requires members to maintain all advertisements, sales literature and independently prepared reprints in a separate file for a period beginning on the date of first use and ending three years from the date of last use. The file must include: (i) A copy of the communication and the dates of first and last use; (ii) the name of the registered principal who approved the communication and the date approval was given, unless such approval was not required pursuant to NASD Rule 2210(b)(1)(D);[18] and (iii) for any communication for which principal approval was not required pursuant to NASD Rule 2210(b)(1)(D), the name of the member that filed the communication with the Department and a copy of the corresponding Department review letter. NASD Rule 2211(b)(2) requires members to maintain records of institutional sales material for a period of three years from the date of last use, including the name of the person who prepared each such communication. NASD Rules 3010(d)(3)[19] and 3110(a)[20] require members to retain correspondence of registered representatives as prescribed by SEA Rule 17a–4.

Proposed FINRA Rule 2210(b)(4)(A) would set forth the record-keeping requirements for retail and institutional communications; generally, these requirements would mirror current record-keeping requirements. This provision incorporates by reference the record-keeping format, medium and retention period requirements of SEA Rule 17a–4.[21]

Proposed FINRA Rule 2210(b)(4)(A) specifies that such records would have to include:

- A copy of the communication and the dates of first and (if applicable) last use;
- The name of any registered principal who approved the communication and the date that approval was given;
- In the case of a retail communication or institutional communication that is not approved prior to first use by a registered principal, the name of the person who prepared or distributed the communication;[22]

[13] *See* NASD Rules 2211(a)(1), (a)(5) and (b)(1)(A); *see also Regulatory Notice* 09–10 (February 2009).

[14] *See Regulatory Notice* 10–06 (January 2010).

[15] *See* NASD Rule 2211(b)(1)(A).

[16] Thus, the current rules require firms to make the determination of whether correspondence that is sent to 25 or more existing retail customers within a 30 calendar-day period requires principal pre-use approval because it makes a financial or investment recommendation or otherwise promotes a product or service of the member. FINRA would expect firms to apply the same analysis going forward regarding principal pre-use approval with respect to all retail communications. FINRA generally considers this exception to cover communications that are more administrative or informational in nature, such as communications that inform investors that their account statement is available online, or the date on which a security in an investor's portfolio is expected to pay a dividend. Communications that are intended to educate investors about products or services, however, do not fall within this exception.

[17] These rules require each member to establish written procedures that are appropriate to its business, size, structure and customers for the review by a registered principal of correspondence and institutional sales material. The procedures must be in writing and be designed to reasonably supervise each registered representative. Where such procedures do not require review of all such communications prior to use or distribution, they must include provision for the education and training of associated persons as to the member's procedures, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to. Evidence of such implementation must be maintained and made available to FINRA upon request.

[18] As noted above, NASD Rule 2210(b)(1)(D) creates an exception from the principal approval requirements of NASD Rule 2210(b)(1)(A) for any advertisement, item of sales literature or independently prepared reprint if, at the time that a member intends to publish or distribute it: (i) Another member has filed it with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member using it in reliance on this exception has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter.

[19] FINRA is proposing to adopt NASD Rule 3010(d)(3) as FINRA Rule 3110.11 (Retention of Correspondence and Internal Communications), subject to certain changes, in the Consolidated FINRA Rulebook. *See* Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (Notice of Filing File No. SR–FINRA–2011–028 (Proposed Rule Change to Adopt the Consolidated FINRA Supervision Rules).

[20] The SEC has approved the adoption of the general recordkeeping requirements of NASD Rule 3110(a) as FINRA Rule 4511, subject to certain changes. FINRA Rule 4511 becomes effective on December 5, 2011. *See* Securities Exchange Act Release No. 63784 (January 27, 2011), 76 FR 5850 (February 2, 2011) (Order Approving File No. SR–FINRA–2010–052); *Regulatory Notice* 11–19 (April 2011).

[21] SEA Rule 17a–4(b) requires broker-dealers to preserve certain records for a period of not less than three years, the first two in an easily accessible place. Among these records, pursuant to SEA Rule 17a–4(b)(4), are ''[o]riginals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public. As used in this paragraph (b)(4), the term communications includes sales scripts.'' SEA Rule 17a–4(f) permits broker-dealers to maintain and preserve these records on ''micrographic media'' or by means of ''electronic storage media,'' as defined in the rule and subject to a number of conditions.

[22] To the extent clerical staff is employed in the preparation or distribution of the communication, the records should include the name of the person

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• Information concerning the source of any statistical table, chart, graph or other illustration used in the communication; and

• For retail communications that rely on the exception under proposed FINRA Rule 2210(b)(1)(C), the name of the member that filed the retail communication with the Department and a copy of the Department's review letter.

Proposed FINRA Rule 2210(b)(4)(B) cross-references NASD Rules 3010(d)(3) [23] and 3110(a) [24] with respect to correspondence record-keeping requirements.

Filing Requirements and Review Procedures

Proposed FINRA Rule 2210(c) generally incorporates the filing requirements in NASD Rule 2210(c), subject to certain changes.

NASD Rule 2210(c)(5)(A) currently requires a member that previously has not filed advertisements with the Department or another self-regulatory organization to file its initial advertisement with the Department at least 10 business days prior to use. This filing requirement continues for a year after the initial filing. Proposed FINRA Rule 2210(c)(1)(A) would trigger the new member one-year filing requirement beginning on the date reflected in the Central Registration Depository (CRD®) system that the firm's FINRA membership became effective, rather than on the date a member first files an advertisement with the Department. Although proposed FINRA Rule 2210 no longer defines the term ''advertisement,'' this new member filing requirement would only apply to retail communications that currently fall under the ''advertisement'' definition, such as generally accessible Web sites, print media communications, and television and radio commercials.

NASD Rule 2210(c)(5)(B) currently authorizes the Department to require a member to file all of its advertisements and/or sales literature, or the portion of the member's material relating to specific types or classes of securities or services, with the Department at least 10 business days prior to use, if the Department determines that the member has departed from NASD Rule 2210's standards. Proposed FINRA Rule 2210(c)(1)(B) would carry forward this authority and apply it to all of a member's communications (rather than just advertisements or sales literature).

NASD Rule 2210(c)(4) currently requires members to file certain communications at least 10 business days prior to first use and to withhold them from use until any changes specified by the Department have been made. These communications include advertisements and sales literature for certain registered investment companies that include self-created rankings, advertisements concerning CMOs, and advertisements concerning security futures.

Proposed FINRA Rule 2210(c)(2) would revise the categories of communications that fall within this pre-use filing requirement. These include retail communications concerning any registered investment company that include self-created rankings, retail communications concerning security futures, and retail communications that include bond mutual fund volatility ratings. The requirement to file retail communications concerning security futures prior to first use would not apply to: (i) Retail communications that are submitted to another self-regulatory organization having comparable standards pertaining to such communications, and (ii) retail communications in which the only reference to security futures is contained in a listing of the services of a member.

Proposed FINRA Rule 2210(c)(3) would revise the categories of communications that must be filed within 10 business days of first use or publication. Similar to NASD Rule 2210(c)(2), proposed FINRA Rule 2210(c)(3) would require retail communications concerning registered investment companies and public direct participation programs to be filed within 10 business days of first use. However, the proposal for the first time would require that *all* retail communications concerning closed-end registered investment companies be filed with FINRA. Currently NASD Rule 2210 requires members to file within 10 business days of first use advertisements and sales literature concerning closed-end funds that are distributed during the fund's initial public offering (''IPO'') period, as well as all advertisements and sales literature concerning continuously offered (interval) closed-end funds.[25] The proposed filing requirement also would apply to retail communications that are distributed after a closed-end fund's IPO period. FINRA believes that investors deserve the same protections concerning retail communications about closed-end funds that are distributed after the IPO period as those that are distributed during the IPO period.

Proposed FINRA Rule 2210(c)(3)(C) would require members to file within 10 business days of first use all retail communications concerning government securities. Currently this requirement only applies to advertisements concerning such securities.[26] Consistent with current requirements, proposed FINRA Rule 2210(c)(3)(D) would require members to file within 10 business days of first use templates for written reports produced by, or retail communications concerning an investment analysis tool, as such term is defined in proposed FINRA Rule 2214.[27]

Proposed FINRA Rule 2210(c)(3)(E) would require members to file within 10 business days of first use retail communications concerning CMOs that are registered under the Securities Act of 1933 (''Securities Act''). Currently members are required only to file advertisements concerning CMOs, but must file them at least 10 business days prior to first use.[28]

Under proposed FINRA Rule 2210(c)(3)(F), members would have to file within 10 business days of first use all retail communications concerning any security that is registered under the Securities Act and that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency, not included within the requirements of paragraphs (c)(1), (c)(2) or sub-paragraphs (A) through (E) of paragraph (c)(3). The purpose of this provision is to require the filing of retail communications concerning publicly offered structured products, such as exchange-traded notes or registered grantor trusts that currently are not required to be filed. This provision excludes retail communications that are already subject to a separate filing requirement found elsewhere in proposed paragraph (c), such as retail communications concerning registered investment companies or public direct participation programs.

Consistent with current rules, proposed FINRA Rule 2210(c)(4) provides that, if a member has filed a draft version or ''story board'' of a television or video retail communication pursuant to a filing requirement, then the member also must file the final filmed version within 10 business days of first use or broadcast.[29]

on whose behalf the communication was prepared or distributed.

[23] *See supra* note 18.

[24] *See supra* note 19.

[25] *See* ''Ask the Analyst,'' *Regulatory & Compliance Alert* (Winter 1999) p. 13.

[26] *See* NASD Rule 2210(c)(2)(C).

[27] *See* NASD Rule 2210(c)(2)(D).

[28] *See* NASD Rule 2210(c)(4)(B).

[29] *See* NASD Rule 2210(c)(6).

Proposed FINRA Rule 2210(c)(5) specifies that a member must provide with each filing the actual or anticipated date of first use, the name, title and CRD® number of the registered principal who approved the communication, and the date of approval. These requirements generally carry forward the current requirements of NASD Rule 2210(c)(1).

Proposed FINRA Rule 2210(c)(6) provides that each member's written communications may be subject to a spot-check procedure, and that members must submit requested material within the time frame specified by the Department. This provision is consistent with current rules.[30]

Proposed FINRA Rule 2210(c)(7) generally duplicates the current exclusions from the filing requirements under NASD Rule 2210(c)(8), with certain modifications. Proposed paragraph (c)(7)(A) would continue the current filing exclusion for retail communications that previously have been filed with the Department and that are to be used without material change.[31] Proposed paragraph (c)(7)(B) would add an exclusion for retail communications that are based on templates that were previously filed with the Department, the changes to which are limited to updates of more recent statistical or other non-narrative information.[32] Proposed paragraph (c)(7)(C) would exclude retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member.[33]

Proposed paragraphs (c)(7)(D), (E), (G) and (H) would preserve for retail communications the current filing exclusions for advertisements and sales literature that do no more than identify a national securities exchange symbol of the member or identify a security for which the member is a registered market maker; advertisements and sales literature that do no more than identify the member or offer a specific security at a stated price; certain ''tombstone'' advertisements governed by Securities Act Rule 134 and press releases that are made available only to members of the media.[34]

Proposed paragraph (c)(7)(F) would modify the current filing exclusion for prospectuses and other documents that have been filed with the SEC or any state.[35] The current filing exclusion does not cover investment company omitting prospectuses published pursuant to Securities Act Rule 482. As modified, this filing exclusion also would not cover free writing prospectuses that are filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).[36] As discussed in *Regulatory Notice* 10–52, FINRA is concerned that broadly disseminated free writing prospectuses present the same investor protection concerns as communications regulated by NASD Rules 2210 and 2211. Accordingly, FINRA interprets NASD Rules 2210 and 2211 to apply to free writing prospectuses distributed by a broker-dealer in a manner reasonably designed to lead to broad unrestricted dissemination.[37] This proposed modification would codify the guidance provided in that *Regulatory Notice.*

Proposed paragraph (c)(7)(I) would maintain the filing exclusion for reprints of independently prepared articles or reports currently found in NASD Rule 2210(c)(8)(H).[38]

Proposed paragraphs (c)(7)(J) and (K) would maintain the current filing exclusions for correspondence and institutional sales material.[39] Proposed paragraph (c)(7)(L) would exclude from filing communications that refer to types of investments solely as part of a listing of products or services offered by the member.[40]

Proposed paragraph (c)(8) would provide that communications excluded from the filing requirements pursuant to paragraphs (c)(7)(H) through (K) would be deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act of 1940 and Rule 24b–3 thereunder. This provision is consistent with NASD Rule 2210(c)(8).

Proposed FINRA Rule 2210(c)(9)(A) would allow FINRA to exempt pursuant to the FINRA Rule 9600 Series, a member from the pre-use filing requirements of paragraph (c)(1)(A) for good cause shown.[41] Proposed paragraph (c)(9)(B) would allow FINRA to grant an exemption from the filing requirements of paragraph (c)(3) for good cause shown after taking into consideration all relevant factors, provided that the exemption is consistent with the purposes of Rule 2210, the protection of investors, and the public interest. Generally this relief would be limited to the same extent as in proposed paragraph (b)(1)(E), which would authorize FINRA to grant exemptive relief from the principal approval requirements in proposed FINRA Rule 2210(b)(1)(A) for retail communications, subject to the same standards.

Content Standards

Proposed FINRA Rule 2210(d) reorganizes but largely incorporates the current content standards applicable to communications with the public that are found in NASD Rule 2210(d), NASD IM–2210–1, NASD IM–2210–4 and Incorporated NYSE Rules 472(i) and (j), subject to certain changes. Content standards that currently apply to advertisements and sales literature generally would apply to retail communications.

Proposed FINRA Rule 2210(d)(1)(A) incorporates the current standards of NASD Rule 2210(d)(1)(A) without substantive change.

Proposed FINRA Rule 2210(d)(1)(B) incorporates the current standards of NASD Rule 2210(d)(1)(B) largely without change, except that it would expressly prohibit promissory statements or claims. The Department staff already interprets NASD Rule 2210(d)(1)(B) to prohibit promissory language in member communications, and Incorporated NYSE Rule 472(i) specifically prohibits promissory statements.

Proposed FINRA Rule 2210(d)(1)(C) incorporates the current standards of

[30] *See* NASD Rule 2210(c)(7).

[31] *See* NASD Rule 2210(c)(8)(A).

[32] This exclusion is based in part on an earlier staff interpretation concerning how NASD Rule 2210's approval, record-keeping and filing requirements apply to statistical updates contained in pre-existing templates. *See* Letter from Thomas M. Selman, NASD, to Forrest R. Foss, T. Rowe Price Associates, Inc., dated January 28, 2002. If a member changed the template's presentation in any material respect, however, this exclusion would not apply.

[33] This filing exception would have the same scope as the proposed exception from the principal pre-use approval requirements for retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member. *See* proposed FINRA Rule 2210(b)(1)(D)(iii).

[34] *See* NASD Rules 2210(c)(8)(C), (D), (F) and (G).

[35] *See* NASD Rule 2210(c)(8)(E).

[36] Securities Act Rule 433(d)(1)(ii) requires any offering participant, other than the issuer, to file with the SEC a free writing prospectus if it is used or referred to by such offering participant and distributed by or on behalf of such person in a manner reasonably designed to lead to its broad unrestricted dissemination.

[37] *See Regulatory Notice* 10–52 (October 2010).

[38] The filing exclusion for reprints of independently prepared articles or reports incorporates the conditions currently included in the definition of ''independently prepared reprint.'' *See* NASD Rule 2210(a)(6)(A). This filing exclusion would also cover independently prepared investment company reports described in NASD Rule 2210(a)(6)(B).

[39] *See* NASD Rules 2210(c)(8)(I) and (J).

[40] NASD Rule 2210(c)(9) similarly excludes from the filing requirements material that refers to investment company securities, direct participation programs, or exempted securities solely as part of a listing of products or services offered by the member.

[41] This provision is consistent with NASD Rule 2210(c)(10).

NASD Rule 2210(d)(1)(C) without change.

Proposed FINRA Rule 2210(d)(1)(D) generally incorporates the standards currently found in NASD IM–2210–1(1), with only minor, non-substantive changes.

Proposed FINRA Rule 2210(d)(1)(E) generally incorporates the standards currently found in NASD IM–2210–1(2), although in a more abbreviated fashion.

NASD Rule 2210(d)(1)(D) currently prohibits communications from predicting or projecting performance, implying that past performance will recur or making any exaggerated or unwarranted claim, opinion or forecast. This provision permits, however, a hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy.

Proposed FINRA Rule 2210(d)(1)(F) would carry forward the current prohibition of performance predictions and projections, as well as, the allowance for hypothetical illustrations of mathematical principles. The proposal also would clarify that FINRA allows two additional types of projections of performance in communications with the public that are not reflected in the text of NASD Rule 2210(d)(1)(D). First, FINRA allows projections of performance in reports produced by investment analyst tools that meet the requirements of NASD IM–2210–6.[42] Second, FINRA has permitted research reports on debt or equity securities to include price targets under certain circumstances.[43]

Accordingly, proposed FINRA Rule 2210(d)(1)(F) would clarify that it does not prohibit an investment analysis tool, or a written report produced by such a tool that meets the requirements of FINRA Rule 2214. Proposed FINRA Rule 2210(d)(1)(F) also would clarify that it does not prohibit a price target contained in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price target, and the price target is accompanied by disclosure concerning the risks that may impede achievement of the price target.[44]

Proposed FINRA Rule 2210(d)(2) incorporates the standards currently found in NASD Rule 2210(d)(2)(B) without substantive change.

NASD Rule 2210(d)(2)(C) requires all advertisements and sales literature to: (i) prominently disclose the name of the member, and allows a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction; (ii) reflect any relationship between the member and any non-member or individual who is also named in the communication; and (iii) if the communication includes other names, reflect which products and services are offered by the member. Proposed FINRA Rule 2210(d)(3) would apply these standards to correspondence as well as to retail communications. Members would be permitted to use the name under which a member's broker-dealer business is conducted as disclosed on the member's Form BD, as well as a fictional name by which a member is commonly recognized or which is required by any state or jurisdiction.

NASD IM–2210–1(5) specifies that in advertisements and sales literature, references to tax-free or tax-exempt income must indicate which income taxes apply, or which do not, unless income is free from all applicable taxes, and provides an example of income from an investment company investing in municipal bonds that is free from federal income tax but subject to state or local income taxes. Proposed FINRA Rule 2210(d)(4)(A) would carry forward this rule for all retail communications and correspondence.

NASD IM 2210–1(4) prohibits communications with the public from characterizing income or investment returns as tax-free or exempt from income tax when tax liability is merely postponed or deferred, such as when taxes are payable upon redemption. Proposed FINRA Rule 2210(d)(4)(B) would carry forward this prohibition for all communications.

Proposed FINRA Rule 2210(d)(4)(C) would add new language concerning comparative illustrations of the mathematical principles of tax-deferred versus taxable compounding.

First, the illustration would have to depict both the taxable investment and the tax-deferred investment using identical investment amounts and identical assumed gross investment rates of return, which may not exceed 10 percent per annum. Second, the illustration would have to use and identify actual federal income tax rates. Third, the illustration would be permitted (but not required) to reflect an actual state income tax rate, provided that the communication prominently discloses that the illustration is applicable only to investors that reside in the identified state. Fourth, the tax rates used in the illustration that is intended for a target audience would have to reasonably reflect its tax bracket or brackets as well as the tax character of capital gains and ordinary income. Fifth, if the illustration covers an investment's payout period, the illustration would have to reflect the impact of taxes during this period. Sixth, the illustration could not assume an unreasonable period of tax deferral.

Seventh, the illustration would have to include the following disclosures, as applicable:

- The degree of risk in the investment's assumed rate of return, including a statement that the assumed rate of return is not guaranteed;
- The possible effects of investment losses on the relative advantage of the taxable versus tax-deferred investments;
- The extent to which tax rates on capital gains and dividends would affect the taxable investment's return;
- Its underlying assumptions;[45]
- The potential impact resulting from federal or state tax penalties (*e.g.,* for early withdrawals or use on non-qualified expenses); and
- That an investor should consider his or her current and anticipated investment horizon and income tax bracket when making an investment decision, as the illustration may not reflect these factors.

Much of this language reflects previous guidance that FINRA has provided regarding tax-deferral illustrations.[46] By placing this rule language in proposed FINRA Rule 2210, FINRA is clarifying that these standards apply to any illustration of tax-deferred versus taxable compounding, regardless of whether it appears in a communication promoting variable insurance products or some other communication, such as one discussing the benefits of investing through a 401(k) retirement plan or individual retirement account. Of course, any communication concerning variable insurance products also must comply with standards specifically applicable to such communications.[47]

[42] *See* NASD IM–2210–6 (Requirements for the Use of Investment Analysis Tools). NASD IM–2210–6 would be codified as FINRA Rule 2214 under the proposed rule change.

[43] *See* NASD Rule 2711(h)(7).

[44] These standards mirror those required for price targets contained in research reports on equity securities under NASD Rule 2711(h)(7).

[45] These assumptions may include, for example, the age at which an investor may begin withdrawing funds from a tax-deferred account, the actual federal tax rates applied in the hypothetical taxable illustration, any state income tax rate applied in the illustration, and the charges associated with the hypothetical investment.

[46] *See* ''NASD Reminds Members of Their Responsibilities Regarding Hypothetical Tax-Deferral Illustrations in Variable Annuity Illustrations,'' NASD *Member Alert* (May 10, 2004).

[47] *See* NASD IM–2210–2; *see also* Securities Exchange Act Release No. 61107 (December 3, 2009), 74 FR 65180 (December 9, 2009) (Notice of

NASD Rule 2210(d)(3) currently requires communications with the public, other than institutional sales material and public appearances, that present the performance of a non-money market mutual fund, to disclose the fund's maximum sales charge and operating expense ratio as set forth in the fund's current prospectus fee table. Proposed FINRA Rule 2210(d)(5) would maintain this standard for retail communications and correspondence.

NASD Rule 2210(d)(1)(E) currently provides that, if any testimonial in a communication with the public concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion. Proposed FINRA Rule 2210(d)(6)(A) carries forward this standard for communications.

NASD Rule 2210(d)(2)(A) requires any advertisement or sales literature that includes a testimonial concerning the investment advice or investment performance of a member or its products to prominently disclose: (i) The fact that the testimonial may not be representative of the experience of other customers; (ii) the fact that the testimonial is no guarantee of future performance or success; and (iii) if more than a nominal sum is paid, the fact that it is a paid testimonial. Proposed FINRA Rule 2210(d)(6)(B) carries forward these disclosure requirements for retail communications and correspondence, and requires disclosure regarding payment if more than $100 in value (rather than a ''nominal sum'') is paid for the testimonial.

Proposed FINRA Rule 2210(d)(7) would revise in several ways the standards currently found in NASD IM–2210–1(6) applicable to communications that contain a recommendation.

First, the proposal would apply these standards to retail communications and public appearances. Currently the standards apply only to advertisements and sales literature.

Second, NASD IM–2210–1(6)(A) requires disclosure of certain specified conflicts of interest to the extent applicable. These disclosures include: (i) If the member was making a market in the recommended securities, or the underlying security if the recommended security is an option or security future, or that the member or associated person will sell to or buy from customers on a principal basis; (ii) if the member and/or its officers or partners have a financial interest in the securities of the recommended issuer and the nature of the financial interest, unless the extent of the financial interest is nominal; and (iii) if the member was manager or co-manager of a public offering of any securities of the recommended issuer in the past 12 months. Proposed FINRA Rule 2210(d)(7)(A) would carry forward the first and third disclosures, but would modify the second disclosure to limit it to financial interests of the member or any associated person with the ability to influence the content of the communication, unless the extent of the financial interest is nominal. This change would substantially narrow the number of parties whose financial interests have to be disclosed, particularly for large members with numerous officers and partners.[48]

Proposed FINRA Rule 2210(d)(7)(B) would require a member to provide, or offer to furnish upon request, available investment information supporting the recommendation, and if the recommendation is for an equity security, to provide the price at the time the recommendation is made. This provision would carry forward the current requirements of NASD IM–2210–6(B).

Third, proposed FINRA Rule 2210(d)(7)(C) would amend the provisions governing communications that include past recommendations, which are currently found in NASD IM–2210–1(6)(C) and (D) and Incorporated NYSE Rule 472(j)(2). The new proposed standards mirror those found in Rule 206(4)–1(a)(2) under the Investment Advisers Act of 1940, which apply to investment adviser advertisements that contain past recommendations.[49]

Fourth, proposed FINRA Rule 2210(d)(7)(D) expressly would exclude from its coverage communications that meet the definition of ''research report'' or that are public appearances by a research analyst for purposes of NASD Rule 2711 and that include all of the applicable disclosures required by that rule. Proposed FINRA Rule 2210(d)(7)(D) also would exclude any communication that recommends only registered investment companies or variable insurance products.[50]

Currently, a ''public appearance'' is defined as ''participation in a seminar, forum (including an interactive electronic forum), radio or television interview, or other public appearance or public speaking activity.''[51] Public appearances are a separate category of communications within the broader term ''communications with the public.'' As such, public appearances must meet the same standards that apply to all communications with the public, such as the requirements that they be fair and balanced and not include false or misleading statements. However, public appearances are not subject to the principal pre-use approval requirements of NASD Rule 2210(b)(1)(A), nor must a member file a public appearance with the Department.

In the interest of simplification, the term ''public appearance'' is no longer a separate communication category. Nevertheless, proposed FINRA Rule 2210(f) sets forth many of the same general standards that would apply to public appearances that exist currently. Public appearances would have to meet the general ''fair and balanced'' standards of proposed paragraph (d)(1). Unlike the current rules governing public appearances, the disclosure requirements applicable to recommendations in proposed paragraph (d)(7) also would apply if the public appearance included a recommendation of a security. The proposal also would require members to establish appropriate written policies and procedures to supervise public appearances, and makes clear that scripts, slides, handouts or other written (including electronic) materials used in connection with public appearances are

Filing File No. SR–FINRA–2009–070) (Proposed Rule Change To Adopt FINRA Rule 2211 (Communications With the Public About Variable Insurance Products)).

[48] FINRA has found that the current rules governing disclosures of financial interests in connection with recommendations contained in advertisements and sales literature, which apply to financial interests of all officers and partners, do not lead to useful disclosure when a firm has a large number of officers or partners. *See* NASD IM–2210–1(6)(A)(ii).

[49] Proposed FINRA Rule 2210(d)(7)(C), like Rule 206(4)–1(a)(2), generally would prohibit retail communications from referring to past specific recommendations of the member that were or would have been profitable to any person. The rule would allow, however, a retail communication or correspondence to set out or offer to furnish a list of all recommendations as to the same type, kind, grade or classification of securities made by the member within the immediately preceding period of not less than one year. The list would have to provide certain information regarding each recommended security and include a prescribed cautionary legend warning investors not to assume that future recommendations will be profitable.

[50] FINRA is proposing to exclude communications that recommend only registered investment companies or variable insurance products because it believes that recommendations of these products do not raise the same kinds of conflicts of interest as recommendations of other types of securities, since they are pooled investment vehicles rather than securities of a single issuer. Nevertheless, there may be other types of sales-related conflicts of interest raised when members recommend such securities. FINRA has addressed these types of conflicts through its rules governing sales of these products. *See* NASD Rule 2830 (Investment Companies Securities) and FINRA Rule 2320 (Variable Contracts of an Insurance Company); *see also* Securities Exchange Act Release No. 64386 (May 3, 2011), 76 FR 26779 (May 9, 2011) (Notice of Filing File No. SR–FINRA–2011–018).

[51] NASD Rule 2210(a)(5).

considered communications for purposes of proposed FINRA Rule 2210.[52]

Use of Investment Company Rankings in Retail Communications

Proposed FINRA Rule 2212 would replace NASD IM–2210–3 with regard to standards applicable to the use of investment company rankings in communications. The standards generally would remain the same. FINRA has revised the standards applicable to investment company rankings for more than one class of an investment company with the same portfolio. Such rankings also must be accompanied by prominent disclosure of the fact that the investment companies or classes have different expense structures. The proposal would add a new paragraph (h) that would exclude from the proposed rule's coverage reprints or excerpts of articles or reports that are excluded from the Department's filing requirements pursuant to proposed FINRA Rule 2210(c)(7)(I).

Requirements for the Use of Bond Mutual Fund Volatility Ratings

Proposed FINRA Rule 2213 would replace NASD IM–2210–5 with regard to standards applicable to the use of bond mutual fund volatility ratings in communications. The standards would remain the same as in NASD IM–2210–5.

Requirements for the Use of Investment Analysis Tools

Proposed FINRA Rule 2214 would replace NASD IM–2210–6 with regard to standards applicable to the use of investment analysis tools. The standards generally would remain the same with some minor changes. Currently NASD IM–2210–6 requires a member that offers or intends to offer an investment analysis tool, within 10 days of first use, to provide the Department access to the tool and file with the Department any template for written reports produced by, or advertisements and sales literature concerning, the tool. Proposed FINRA Rule 2214(a) would require members to provide the Department with access to the tool and to file any template for written reports produced by, or any retail communication concerning, the tool within 10 *business* days of first use. This revision makes the access and filing requirement time frame consistent with other filing requirements under proposed FINRA Rule 2210(c).

The proposal also would move some language that is currently contained either in NASD IM–2210–6's text or in footnotes to Supplementary Material that follows the Rule. Proposed Supplementary Material 2214.06 would provide that a retail communication that contains only an incidental reference to an investment analysis tool would not have to include the disclosures otherwise required for retail communications that advertise an investment analysis tool, and would not have to be filed with FINRA unless otherwise required by FINRA Rule 2210.[53] In addition, the Supplementary Material would provide that, if a retail communication refers to an investment analysis tool in more detail but does not provide access to the tool or the results generated by the tool, the communication would only have to include the disclosures required by paragraphs (c)(2) and (c)(4) of proposed Rule 2214. Proposed Supplementary Material 2214.07 provides additional detail regarding disclosure required by paragraph (c)(3) of Rule 2214. This language is currently found in footnote 4 to IM–2210–6. However, FINRA has added a specific requirement to disclose whether the investment analysis tool is limited to searching, analyzing or in any way favoring securities in which the member serves as an underwriter.

Communications With the Public Regarding Security Futures

Proposed FINRA Rule 2215 would replace NASD IM–2210–7 with regard to standards applicable to communications concerning security futures. Proposed FINRA Rule 2215 would revise the current standards in several respects.

First, portions of NASD IM–2210–7 apply only to advertisements. Proposed FINRA Rule 2215 would apply these provisions to all retail communications.

Second, NASD IM–2210–7(a)(1) requires members to submit all advertisements concerning security futures to the Department at least 10 days prior to use. Proposed FINRA Rule 2215(a)(1) would require members to submit all retail communications concerning security futures to the Department at least 10 *business* days prior to *first* use. Both the current and the proposed filing provisions would require a member to withhold the communication from publication or circulation until any changes specified by the Department have been made.

Third, the proposal would amend the provisions that require communications concerning security futures to be accompanied or preceded by the security futures risk disclosure document under certain circumstances.[54] As revised, a communication concerning security futures would have to be accompanied or preceded by the risk disclosure document if it contained the names of specific securities.

Fourth, proposed FINRA Rule 2214(b)(4)(D) would clarify that communications that contain the historical performance of security futures must disclose all relevant costs, which must be reflected in the performance.

Communications With the Public About Collateralized Mortgage Obligations

Proposed FINRA Rule 2216 would replace NASD IM–2210–8 with regard to standards applicable to retail communications concerning CMOs. The standards would remain the same as in IM–2210–8.

As noted above, FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval. The implementation date will be no later than 365 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[55] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will help ensure that investors are protected from potentially false or misleading communications with the public distributed by FINRA member firms.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[52] The requirement to establish supervisory policies and procedures for public appearances is consistent with NASD Rule 3010(b) and Incorporated NYSE Rule 472(l).

[53] This provision is consistent with footnote 3 to NASD IM–2210–6.

[54] *See* NASD IM–2210–7(b).

[55] 15 U.S.C. 78*o*–3(b)(6).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

In September 2009, FINRA published *Regulatory Notice* 09–55 (the ''*Notice*'', requesting comment on the rules as proposed therein (the ''*Notice* proposal''). A copy of the *Notice* was filed with the Commission as Exhibit 2a. The comment period expired on November 20, 2009. FINRA received 23 comments in response to the *Notice.* A list of the commenters in response to the *Notice* was filed with the Commission as Exhibit 2b, and copies of the comment letters received in response to the *Notice* were filed with the Commission as Exhibit 2c.[56] The text of Exhibits 2a, 2b and 2c are available on FINRA's Web site at *http://www.finra.org*, at the principal office of FINRA and at the Commission's Public Reference Room. A summary of the comments and FINRA's response is provided below.

Communication Categories

Interactive Electronic Communications

Cornell, Cutter, PIABA, SIFMA, StockCross, Vanguard and Wells Fargo generally supported the proposed consolidation of the six current communication categories under NASD Rule 2210 into three categories under proposed FINRA Rule 2210(a). Fidelity and the ICI suggested that FINRA add a new separate communication category for ''interactive electronic communications,'' which would include real-time interactive electronic communications made through social media Web sites, and that FINRA allow this communication to be supervised in a manner similar to the supervision of correspondence.

FINRA does not believe adding a fourth communication category for interactive electronic communication categories is necessary. However, as discussed below, FINRA has modified the principal review and approval requirements under proposed paragraph (b) to allow retail communications that are posted on online interactive electronic forums to be supervised in the same manner as correspondence.[57] FINRA believes that this modification of the principal review and approval requirements achieves the same result sought by Fidelity and the ICI.

Definition of Correspondence

The *Notice* proposal defined ''correspondence'' as any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors. The *Notice* proposal likewise defined ''retail communication'' as any written (including electronic) communication that is distributed or made available to more than 25 retail investors.

The proposed definition of ''correspondence'' generated a number of comments. The CAI, the ICI, TLGI, MBSC, NPHI, TD Ameritrade, Vanguard and WilmerHale objected to treating communications to more than 25 retail investors as retail communications rather than correspondence. These commenters argued that the 25-investor cutoff is arbitrary, and that given the challenges in monitoring whether a communication is limited to 25 or fewer recipients, members would be forced to treat all letters and emails as retail communications. These commenters recommended that FINRA revise the proposal to include within the definition of ''correspondence'' emails to existing retail customers, regardless of the number of recipients.

NASD Rule 2211(a)(1) defines ''correspondence'' as ''any written letter or electronic mail message and any market letter distributed by a member to: (A) One or more of its existing retail customers; and (B) fewer than 25 prospective retail customers within any 30 calendar-day period.'' However, NASD Rule 2211 also requires a member to have a registered principal approve prior to use correspondence that is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member.[58]

FINRA is not revising the definition of ''correspondence'' to include e-mails or written letters to existing retail customers without limit as to the number of recipients. However, to address the concern raised by the commenters, FINRA has revised the proposed principal approval requirements to exclude communications to retail investors that do not make any financial or investment recommendation or otherwise promotes a product or service of the member.[59] This revision will continue to allow members to distribute non-promotional e-mails and other communications to retail investors without having a principal approve them prior to use.

Unlike the current definition of ''correspondence'' under NASD Rule 2211, the *Notice* proposal's definition of ''correspondence'' did not reference a 30 calendar-day window within which to count the number of recipients. Cutter, the ICI, Morgan, SIFMA, WGSI and WilmerHale all objected to the elimination of the 30 calendar-day period. In response to these comments, FINRA has revised the definition of ''correspondence'' to include written communications distributed or made available to 25 or fewer retail investors within any 30 calendar-day period. FINRA likewise has revised the definition of ''retail communication'' to include written communications that are distributed or made available to more than 25 retail investors within any 30 calendar-day period.

The current definition of ''correspondence'' includes ''market letters,'' which are defined as ''any written communication excepted from the definition of 'research report' pursuant to NASD Rule 2711(a)(9)(A).''[60] The *Notice* proposal's definition of ''correspondence'' did not include market letters. Forefield and Wells Fargo opposed the elimination of market letters from the definition of correspondence. These commenters requested that FINRA either revise the definition to include market letters, or provide an exception from the principal approval requirements for market letters.

In the interest of keeping the definition of ''correspondence'' as straightforward as possible, FINRA is not revising the definition to include market letters. However, FINRA has revised the principal approval requirements to allow members to supervise any retail communication that is excepted from the definition of ''research report'' pursuant to NASD Rule 2711(a)(9)(A) in the same manner as correspondence.[61] FINRA believes that the same rationale it used to provide members with more flexibility in supervising market letters continues to exist, and thus has made this change to the principal approval requirements.[62]

Definitions of Institutional Communication and Institutional Investor

The *Notice* proposal defined ''institutional communication'' as ''any written (including electronic) communication that is distributed or made available only to institutional investors.'' TD Ameritrade commented that ''or made available to'' should be deleted from the definition and replaced

[56] *See* Exhibit 2b for a list of abbreviations assigned to commenters.

[57] *See* proposed FINRA Rule 2210(b)(1)(D)(ii).

[58] *See* NASD Rule 2211(b)(1)(A).

[59] *See* proposed FINRA Rule 2210(b)(1)(D)(iii).

[60] *See* NASD Rule 2211(a)(5).

[61] *See* proposed FINRA Rule 2210(b)(1)(D)(i).

[62] *See Notice to Members* 09–10 (February 2009).

with ''intended for an audience of.'' With this change, TD Ameritrade noted that members could post to Web sites that are intended for institutional investors without having to make it password-protected.

FINRA disagrees with this comment. If members were merely required to ''intend'' that a communication reach institutional investors, they could effectively distribute the communication to anyone simply by including a disclaimer regarding its intended audience. This rule change would make the distinction between institutional communications and retail communications virtually meaningless.

The *Notice* proposal defined ''institutional investor'' to include persons described in NASD Rule 3110(c)(4) (definition of ''institutional account''), government entities and subdivisions, certain employee benefit and qualified plans that have at least 100 participants, members and their registered personnel, and persons acting on behalf of institutional investors. Fidelity requested that FINRA clarify that if an employer offers multiple employee benefit plans, the plans may be aggregated for purposes of calculating the number of participants. FINRA has revised the definition of ''institutional investor'' to allow aggregation of multiple plans offered by a single employer.

Fidelity, SIFMA and WilmerHale argued for expanding the definition of ''institutional investor'' to include non-retail entities with assets under $50 million.[63] FINRA believes that the definition is already sufficiently broad, and that entities that have assets of less than $50 million often require the same investor protections regarding sales material as a retail investor.

SIFMA and TD Ameritrade argued that the rule should make clear that if a member provides an institutional communication to another member, the first member is not responsible if the second member forwards the communication to retail investors. FINRA believes that, while one member generally is not responsible for the actions of another, such a determination will be subject to the facts and circumstances. Moreover, a member may not provide an institutional communication to another if the member has reason to believe that it will be forwarded to retail investors. Accordingly, FINRA declines to make this change.

FINRA has added a Supplementary Material to FINRA Rule 2210 to clarify the extent to which a member's internal communications would be considered institutional communications. The Supplementary Material provides that a member's internal written (including electronic) communications that are intended to educate or train registered persons about the products or services offered by a member are considered institutional communications pursuant to paragraph (a)(3) of proposed FINRA Rule 2210. Accordingly, such internal communications are subject to both the provisions of proposed FINRA Rule 2210 and NASD Rule 3010(d).

Definition of Retail Communication

The *Notice* proposal defined ''retail communication'' as ''any written (including electronic) communication that is distributed or made available to more than 25 retail investors.'' ''Retail investor'' was defined as ''any person other than an institutional investor.'' Generally ''retail communication'' would include communications that currently fall under the definitions of ''advertisement'' and ''sales literature.''

The CAI and NPHI both expressed concern that combining advertisements and sales literature into a single category might lead FINRA staff to apply the same standards to all retail communications regardless of the intended audience. These commenters recommended that FINRA provide guidance that it will continue to take into account the anticipated audience for a proposed retail communication when determining what disclosures and other content standards to apply.

FINRA notes that proposed FINRA Rule 2210(d)(1)(E) provides that ''[m]embers must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.'' While proposed FINRA Rule 2210's content standards apply to all retail communications, the level of detail and explanation required for a particular retail communication will depend on the audience to which it is directed.

It may be unclear whether the definition of ''retail investor'' includes persons who are not customers of a member. Accordingly, FINRA has revised the definition to add at its end ''regardless of whether the person has an account with a member.''[64]

Approval and Recordkeeping

Review and Approval of Retail Communications

FINRA Rule 2210(b)(1)(A) in the *Notice* proposal provided that ''an appropriately qualified registered principal'' must approve each retail communication before the earlier of its use or filing with the Department. SIFMA and Wells Fargo commented that the proposal should provide greater guidance as to which principal registration category is required to approve different categories of retail communications. FINRA believes that this issue is already addressed in the registration rules for principals and supervisors.[65] Accordingly, FINRA does not believe that it would be appropriate or useful to restate those rules' provisions in the rules governing communications with the public.

In a similar vein, Morgan, SIFMA and WilmerHale requested clarification as to whether a Series 9/10 general securities sales supervisor would be permitted to review and approve retail communications and correspondence. Currently, Series 9/10 supervisors are qualified to review and approve correspondence and sales literature, but are not qualified to approve advertisements as defined in NASD Rule 2210.[66] While the scope of a Series 9/10 supervisor's activities are not part of this rule proposal, FINRA notes that it has separately proposed to adopt new FINRA rules that would allow a general securities sales supervisor to approve both correspondence and retail communications.[67]

The ICI requested confirmation that the principal approval requirements do not apply to the updating of templates contained in retail communications. FINRA does not intend to revise its earlier interpretive position with regard to the updating of templates as stated in a 2002 interpretive letter to T. Rowe Price Associates, Inc.[68] Moreover, proposed paragraph (c)(7)(B) would add an exclusion from the filing

[63] Under NASD Rule 3110(c)(4), a person who does not fall within one of the enumerated categories must have total assets of at least $50 million to be considered an institutional account. The SEC recently approved the adoption of NASD Rule 3110(c)(4) as FINRA Rule 4512(c) without material change. *See* Securities Exchange Act Release No. 63784 (January 27, 2011), 76 FR 5850 (February 2, 2011) (Order Approving File No. SR–FINRA–2010–052). FINRA Rule 4512 becomes effective on December 5, 2011. *See Regulatory Notice* 11–19 (April 2011).

[64] As noted above, FINRA also revised the definition of ''retail communication'' to add at its end ''within any 30 calendar-day period.''

[65] *See* NASD Rules 1020 *et seq.*

[66] *See* NASD Rule 1022(g)(2)(C)(iii).

[67] *See Regulatory Notice* 09–70 (December 2009), Attachment B (proposed FINRA Rule 1230(a)(10)) (eliminates current restriction on Series 9/10 supervisors approving advertisements).

[68] *See* Letter from Thomas M. Selman, NASD, to Forrest Foss, T. Rowe Price Associates Inc., dated January 28, 2002 (interpreting the approval, filing and recordkeeping requirements of NASD Rule 2210 as generally not applying to statistical updates contained in pre-existing templates).

requirements for retail communications that are based on templates that were previously filed with the Department, the changes to which are limited to updates of more recent statistical or other non-narrative information.

SIFMA recommended that FINRA reiterate its previous interpretive guidance regarding the supervision of electronic communications as set forth in *Regulatory Notice* 07–59.[69] FINRA is separately addressing the staff guidance contained in *Regulatory Notice* 07–59 regarding the supervision of electronic communications as part of its proposal to adopt new FINRA Rule 3110.[70]

The CAI, Cornell, Fidelity, the FSI, MBSC, NPHI, SIFMA, Vanguard, and WGSI commented that FINRA should address the supervision requirements for social networking sites and include them in the revised proposal filed with the SEC. After *Regulatory Notice* 09–55 was published for comment, but before this filing with the SEC, FINRA published *Regulatory Notice* 10–06, which provides guidance on blogs and social networking Web sites.[71] Among other things, that *Notice* addressed the supervision of social media sites and specified that members may adopt supervisory procedures similar to those outlined for electronic correspondence in *Regulatory Notice* 07–59. FINRA is now codifying this guidance as part of proposed FINRA Rule 2210. Proposed paragraph (b)(1)(D)(ii) specifies that the requirements of paragraph (b)(1)(A), which require a principal to approve retail communications prior to use, will not apply to retail communications that are posted on an online interactive electronic forum, provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d).

In addition, given the rapid changes to technology used to communicate with customers, FINRA believes it will be useful going forward to have exemptive authority with regard to the principal pre-use approval requirements applicable to retail communications in certain circumstances. Accordingly, FINRA has added a new proposed paragraph (b)(1)(E) that would authorize FINRA to grant an exemption from the principal approval requirements of paragraph (b)(1)(A) for good cause shown and to the extent that such exemption is consistent with the purposes of Rule 2210, the protection of investors, and the public interest.

Review and Approval of Research-Related Retail Communications

FINRA Rule 2210(b)(1)(B) in the *Notice* proposal provided that, ''[w]ith respect to research reports on debt and equity securities, the requirements of paragraph (b)(1)(A) may be met by a Supervisory Analyst approved pursuant to NYSE Rule 344.'' This language duplicated an identical provision in NASD Rule 2210(b)(1)(B). SIFMA and WilmerHale requested that FINRA clarify that a supervisory analyst also may review and approve research-related communications that are not research reports, such as market letters, research notes and economic analyses.

FINRA does not believe such a clarification is necessary. Proposed paragraph (b)(1)(D)(i) would except from the requirements of paragraph (b)(1)(A) any retail communication that is excepted from the definition of ''research report'' pursuant to NASD Rule 2711(a)(9)(A), provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence. NASD Rule 2711(a)(9)(A) excludes from the definition of ''research report'' a broad range of research-related communications, such as discussions of broad-based indices, commentaries on economic, political or market conditions, and certain other research-related communications.[72] By allowing firms to supervise and review these communications in the same manner as firms supervise and review correspondence, FINRA believes that firms will have sufficient flexibility to address the concerns raised by SIFMA and WilmerHale.

Administrative Communications

FINRA Rule 2210(b)(1)(D) in the *Notice* proposal excluded from the principal approval requirements of paragraph (b)(1)(A) ''any retail communication that is solely administrative in nature.'' The CAI, Cutter, Fidelity, the FSI, Invesco, the ICI, MBSC, Morgan and SIFMA noted that currently NASD Rule 2211 does not require principal pre-use approval of e-mails and written letters to existing retail customers (without limit) as long as the communication does not make an investment recommendation or promote a product or service of the member.[73] These commenters argued that FINRA should make clear that these communications are included within the ''solely administrative'' exception. PIABA expressed concern that this exception could be used by members as a loophole to avoid principal review, and recommended that FINRA better define which communications fall within this exception.

In response to these comments, FINRA has revised paragraph (b)(1)(D) to eliminate the reference to ''solely administrative'' retail communications, and instead to exclude ''any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.'' This language is currently used in NASD Rule 2211(b)(1)(A) with regard to the requirements for supervising correspondence that is sent to 25 or more existing retail clients, and thus maintains the same standard members face today with regard to such correspondence. In addition, FINRA believes the revised text better defines the scope of this exclusion. Members would still be required to supervise such retail communications in the same manner as required for supervising and reviewing correspondence pursuant to NASD Rule 3010(d).

FINRA is also adding a new paragraph (b)(1)(F) to clarify that, notwithstanding any other provision of proposed FINRA Rule 2210, an appropriately qualified principal must approve a communication prior to a member filing the communication with the Department.

Recordkeeping Requirements

FINRA Rule 2210(b)(4) in the *Notice* proposal set forth members' recordkeeping obligations with respect to each communication category. Proposed paragraph (b)(4)(A)(ii) provided that, with respect to institutional communications, records must include ''the name of the person who prepared or distributed the communication.'' Fidelity, the ICI and MBSC supported the requirement to maintain records of the person who prepared a communication, but opposed a requirement to keep records of the person who distributed the communication, which they believed would be difficult to implement. TD Ameritrade recommended that members be required to keep records of the person who prepared an institutional

[69] *See Regulatory Notice* 07–59 (December 2007).

[70] *See* Securities Exchange Act Release No. 64736 (June 23, 2011), 76 FR 38245 (June 29, 2011) (Notice of Filing File No. SR–FINRA–2011–028).

[71] *See Regulatory Notice* 10–06 (January 2010).

[72] Currently NASD Rule 2211(a)(1) includes within the definition of ''correspondence'' any ''market letter.'' ''Market letter'' is defined as any written communication excepted from the definition of ''research report'' pursuant to NASD Rule 2711(a)(9)(A). *See* NASD Rule 2211(a)(5). Thus, the proposal would allow members to continue to supervise market letters in the same manner as they supervise correspondence.

[73] *See* NASD Rule 2211(b)(1)(A).

communication only where a registered principal has not approved it.

In response to these comments, FINRA has revised the recordkeeping provisions. As revised, a member's records must include the name of any registered principal who approved a communication and the date approval was given.[74] In the case of a retail communication or institutional communication that is not approved prior to first use by a registered principal, the records must include the name of the person who prepared or distributed the communication. Thus, a member would not have to keep records of the person who distributed a retail communication or institutional communication, if the records included either the registered principal who approved the communication, or the person who prepared the communication.

FINRA Rule 2210(b)(4)(A)(iv) in the *Notice* proposal required records to include ''the source of any statistical table, chart, graph or other illustration used in the communication.'' Fidelity and the FSI requested that FINRA clarify what is required regarding sources of statistical tables or charts. For example, is it sufficient to have a citation to a study, or must a record include a copy of the study itself? In response to these comments, FINRA has revised proposed FINRA Rule 2210(b)(4)(A)(iv) to require ''information concerning'' the source of the table or chart. This revision reflects the current recordkeeping requirements for sources of statistical tables or charts.[75]

Filing Requirements

Filing Requirements for New Members and Certain Rule Violators

FINRA Rule 2210(c)(1)(A) in the *Notice* proposal required a new member to file with the Department all of its retail communications for a one-year period beginning on the effective date a member becomes registered with FINRA. This new member filing requirement differs from NASD Rule 2210(c)(5)(A), which applies only to advertisements and commences on the first date a new member files an advertisement with the Department. Proposed paragraph (c)(1)(B) provided that, if the Department determines that a member has departed from proposed FINRA Rule 2210's standards, it may require the member to file all or part of its communications at least 10 business days prior to use.

Cornell opposed the commencement date of the new member filing period, arguing that this will decrease the time during which the Department will monitor a new member's communications. FINRA disagrees that the new filing period is insufficient. Members are still subject to a filing requirement during their first year of operation and are required to file certain retail communications thereafter. In addition, members are always subject to spot-check procedures. Nevertheless, to ensure that the starting date for this filing requirement is clear, FINRA has revised this provision to specify that the one-year filing period begins on the date reflected in the CRD® system as the date the firm's FINRA membership became effective.

WilmerHale opposed the breadth of this expanded filing requirement, which would cover communications that currently qualify as sales literature and thus do not have to be filed. WilmerHale argued that this expanded filing requirement would substantially hinder new firms' operations. SIFMA similarly argued that this filing requirement should exclude password-protected Web sites, since they are considered sales literature rather than advertisements under current rules.

FINRA recognizes that it may be burdensome for new firms to file all of their retail communications, including form letters and group e-mails sent to 25 or more retail investors within a 30 calendar-day period. Accordingly, FINRA has narrowed the scope of this filing requirement to cover only retail communications that are published or used in any electronic or other public media, including any generally accessible Web site, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures or telephone directories (other than routine listings). This narrowing of the filing requirement would require new firms to file only retail communications that currently fall within the definition of ''advertisement'' under NASD Rule 2210, thus not changing the scope of this filing requirement as compared to current standards. The filing requirements of proposed paragraph (c)(1)(A) would not apply to password-protected Web sites.

Fidelity commented that FINRA should be required to delineate the administrative process that must be followed before it can impose a pre-use filing requirement on members that have violated the communications rules. FINRA believes that proposed paragraph (c)(1)(B) specifies the steps FINRA must take before it may impose this requirement. The paragraph states that the Department must notify the member in writing of the types of communications to be filed and the length of time the requirement is to be in effect. The paragraph also states that any such filing requirement will take effect 21 calendar days after service of the written notice, during which time the member may request a hearing under FINRA Rules 9551 and 9559.

Retail Communications Concerning Structured Products

FINRA Rule 2210(c)(2)(B) in the *Notice* proposal required members to file at least 10 business days prior to use, retail communications concerning publicly offered CMOs, options, security futures, and any other publicly offered securities derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency (''structured products''). These pre-use filing requirements would not apply to retail communications concerning options or security futures that are submitted to another self-regulatory organization having comparable standards, retail communications in which the only reference to options or security futures is contained in a listing of the member's services, and retail communications that are subject to a separate filing requirement in paragraph (c) of the proposed rule.

Cornell, the ICI, PIABA and Vanguard supported the pre-use filing requirement for retail communications concerning structured products. Fidelity commented that FINRA should list which products fall within this requirement, and clarify that investment company products do not fall within this requirement. Fidelity also recommended that this filing requirement exclude factual material about structured products, such as research reports and fact sheets, and that FINRA should allow a member to use retail communications that are filed with the Department if the member does not receive a response from FINRA within 10 business days.

Invesco and SIFMA commented that the proposal should be revised to eliminate the pre-use filing requirement for retail communications concerning structured products, and instead allow members to file such communications within 10 business days of first use. SIFMA also recommended that the reference to retail communications concerning options be stricken, since these communications are separately regulated under FINRA Rule 2220. In addition, SIFMA requested that FINRA exempt from this filing requirement retail communications concerning structured products for which there is a

[74] *See* proposed FINRA Rule 2210(b)(4)(A)(ii).

[75] *See* NASD Rule 2210(b)(2)(B).

registration exemption under the Securities Act.

StockCross argued that the pre-use filing requirement for retail communications concerning structured products will hinder business since often these products have a limited offering period. Wells Fargo suggested that retail investors will be put at a disadvantage relative to institutional investors since retail investors will not be able to receive sales material concerning structured products until after the member receives Department staff's comments to filed communications.

WilmerHale also opposed the pre-use filing requirement for retail communications concerning structured products. WilmerHale argued that the burdens on members will strongly outweigh any benefit to investors. For example, members would be prevented from sending group e-mails to clients reminding them that their options are in the money without first filing such an e-mail with FINRA at least 10 business days prior to transmission. WilmerHale and SIFMA both expressed concern that FINRA lacks the resources necessary to review such communications. WilmerHale also recommended that FINRA exclude all research from the requirements of proposed FINRA Rule 2210 and address any specific concerns under NASD Rule 2711.

In response to these comments, FINRA is revising the filing requirements for retail communications concerning options, CMOs and structured products. FINRA agrees that FINRA Rule 2220 separately imposes a filing requirement for advertisements and sales literature concerning options; accordingly, it is unnecessary to include a separate filing requirement for retail communications concerning options under proposed FINRA Rule 2210. Thus, the reference to retail communications concerning options has been deleted.

FINRA also agrees that there may be situations in which a pre-use filing requirement would prevent members from distributing time-sensitive retail communications concerning CMOs and structured products in a timely manner. Accordingly, FINRA has revised the proposal to permit members to file retail communications concerning CMOs and structured products within 10 business days of first use, instead of at least 10 business days prior to use.[76]

FINRA does not believe it is appropriate to attempt to list all products that are derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency. Members frequently develop new types of retail structured products that would not be included in any list that FINRA created today. Thus, FINRA believes that it is better to leave open the possibility that retail communications concerning new products also will fall under this filing requirement.

FINRA agrees that retail communications concerning registered investment companies are not subject to the filing requirement covering structured products communications, since they are already subject to a separate filing requirement under proposed paragraphs (c)(2)(A), (c)(2)(C) and (c)(3)(A). FINRA has added language to proposed paragraph (c)(3)(F) to make this more clear.

FINRA does not agree that retail communications that only present ''factual information'' about structured products should be excluded. Arguably all sales material is ''factual,'' and the determination of which communications are not factual would be highly subjective. In addition, the proposal already excludes from filing retail communications whose only reference to investments is solely as part of a listing of products and services offered by the member.[77]

FINRA agrees that the filing requirement should not apply to retail communications concerning structured products that are not registered under the Securities Act. As a general matter, the filing requirements under NASD Rule 2210 do not apply to communications concerning privately placed securities, since typically these securities are not widely advertised. Accordingly, FINRA has added language to proposed paragraph (c)(3)(F) to clarify that the filing requirement only applies to retail communications concerning structured products that are registered under the Securities Act.

FINRA disagrees with the assertion that it lacks the resources to review retail communications concerning structured products. FINRA will ensure that the Department has the necessary staffing to review such material in a timely manner. Additionally, by allowing members to file such communications concurrent with use, this revision takes some of the time pressure off members that seek to distribute retail communications prior to receiving staff comments.

FINRA also disagrees that proposed FINRA Rule 2210 should not apply to research. While NASD Rule 2711 does impose some content standards on research reports, it does not include the more general standards of proposed FINRA Rule 2210 that require communications to be fair and balanced. In addition, proposed FINRA Rule 2210 requires certain non-independent research, such as research prepared by a member or its affiliate on mutual funds or exchange-traded funds (''ETFs''), to be filed with the Department.

Retail Communications Concerning Closed-End Funds

FINRA Rule 2210(c)(3)(A) in the *Notice* proposal required members to file all retail communications concerning registered closed-end investment companies. Currently, FINRA only requires members to file such communications during a closed-end fund's IPO period.

Cornell, the ICI, PIABA and Vanguard supported this expanded filing requirement. The ICI requested that FINRA clarify that its rules only reach members that prepare closed-end fund communications, and not the fund itself or its adviser. The ICI also requested that FINRA clarify that a fund underwriter is not responsible for communications concerning a closed-end fund prepared by an unaffiliated member.

FINRA rules apply to communications used by FINRA member firms. While its rules do not apply to non-member firms, such as investment companies and investment advisers that are not registered as broker-dealers, they do apply to any communications used by a member, regardless of which entity prepared the communications. Generally, FINRA does not hold one member responsible for the actions of another member, but considers each case separately based on the facts and circumstances.

Wells Fargo opposed the requirement to file retail communications concerning closed-end funds after the IPO period has expired, arguing that trading closed-end funds on the secondary market does not raise the same concerns as during the IPO period. FINRA disagrees with this argument. FINRA currently requires members to file retail communications concerning other types of investment company securities that are traded on the secondary market, such as ETFs. In addition, FINRA believes that investor protection concerns can arise from any retail communication concerning a closed-end fund, regardless of when it is distributed.

[76] *See* proposed FINRA Rules 2210(c)(3)(E) and (F).

[77] *See* proposed FINRA Rule 2210(c)(7)(L).

Filing Exclusions for Non-Material Changes and Templates

FINRA Rule 2210(c)(7)(A) in the *Notice* proposal excluded from the filing requirements of proposed paragraphs (c)(1) through (c)(4) ''retail communications that previously have been filed and that are used without material change, including retail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of more recent statistical or other non-narrative information.'' NASD Rule 2210(c)(8)(A) includes the same filing exclusion for previously filed advertisements and sales literature that are used without material change, but does not contain any express filing exclusion for templates.

The CAI, Fidelity, the ICI and MBSC expressed concern that proposed paragraph (c)(7)(A) would narrow the current filing exclusion for communications used without material change. By including the template filing exclusion in the same paragraph, these commenters feared that this filing exception would not allow non-material changes to narrative information. FINRA did not intend to narrow the current filing exclusion for retail communications that are used without material change. Accordingly, FINRA has separated the filing exclusion for previously filed retail communications that are used without material change from the exclusion for certain previously filed templates.[78]

Filing Exclusion for Administrative Communications

FINRA Rule 2210(c)(1)(B) in the *Notice* proposal excluded from the filing requirements retail communications ''that are solely administrative in nature.'' This filing exclusion replaced a current exclusion for advertisements and sales literature ''solely related to recruitment or changes in a member's name, personnel, electronic or postal address, ownership, offices, business structure, officers or partners, telephone or teletype numbers, or concerning a merger with, or acquisition by, another member.'' [79]

SIFMA requested that FINRA clarify that this exclusion covers generic documents or excerpts describing a member's products or services, even if they reference a product subject to the filing requirements. Vanguard requested that this filing exclusion specifically reference the list of items that is excluded under current rules. Wells Fargo argued that this exclusion should not be limited to the administrative items that are excluded under current rules.

SIFMA's interpretation of this filing exclusion is broader than FINRA intended. However, FINRA acknowledges that ''solely administrative in nature'' may be unclear to some members. Accordingly, FINRA is revising this exclusion to cover retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member. In this regard, the filing exclusion covers the same retail communications that are excepted from the principal approval requirements under proposed FINRA Rule 2210(b)(1)(D).

Other Filing Exclusions

FINRA Rule 2210(c)(7)(G) of the *Notice* proposal excluded from the filing requirements reprints and excerpts of certain articles and reports produced by independent third parties. SIFMA requested that FINRA clarify whether that filing exclusion covered independent third-party research reports concerning registered investment companies, which are currently excluded from filing under NASD Rule 2210(c)(8)(H). FINRA does intend this filing exclusion also to cover independent research reports on registered investment companies which are excluded from filing under the current rules.

FINRA Rule 2210(c)(7)(J) of the *Notice* proposal excluded from the filing requirements communications that refer to investment company securities, direct participation programs or exempted securities solely as part of a listing of products or services offered by the member. TD Ameritrade requested that FINRA expand this exclusion to allow members to discuss the types of securities that can be traded through a member, to include general descriptions of these securities, to explain the functionality of online tools and trading platforms, and to present related fees and commissions, as long as no actual security is named. Cutter requested that this exclusion permit a listing of any type of investment a member offers, not just the securities described in the paragraph.

FINRA does not believe TD Ameritrade's proposed expansion would be appropriate, since it would cover many types of retail communications that normally require review by Department staff. FINRA agrees, however, that a communication that refers to an investment solely as part of a listing of a member's products and services should be excluded from filing. FINRA has modified this filing exclusion accordingly.[80]

The *Notice* proposal would have eliminated a current filing exclusion for press releases that are made available only to members of the media.[81] The *Notice* proposal stated that FINRA staff found that members almost always post press releases on their Web sites, thus making them available to the general public, and making this filing exclusion inapplicable. Fidelity, the ICI and MBSC commented that members still rely on this filing exclusion, and thus objected to its elimination. Based on these representations, FINRA has reinstated the filing exclusion for press releases made available only to members of the media.[82]

In 2006, FINRA published an interpretive letter stating that free writing prospectuses are excluded from the provisions of NASD Rules 2210 and 2211.[83] Based on this 2006 letter, Morgan, SIFMA and WilmerHale requested that FINRA include a filing exclusion for free writing prospectuses. In October 2010, FINRA published a *Regulatory Notice* that withdrew, in part, the guidance provided in the 2006 interpretive letter.[84] In the 2010 *Notice,* FINRA stated that broadly disseminated free writing prospectuses present the same investor protection concerns as communications governed by NASD Rules 2210 and 2211. Accordingly, FINRA announced that it now interprets FINRA Rules 2210 and 2211 to apply to free writing prospectuses distributed by a broker-dealer in a manner reasonably designed to lead to broad unrestricted dissemination. Based on this new guidance, rather than exclude free writing prospectuses, FINRA is modifying the current filing exclusion for SEC-filed documents not to cover broadly disseminated free writing prospectuses filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).[85] Thus, such free writing prospectuses must be filed with FINRA to the extent that they constitute a retail communication covered by another filing requirement (such as a free writing prospectus concerning a structured product registered under the Securities Act).

[78] *See* proposed FINRA Rules 2210(c)(7)(A) and (B).

[79] *See* NASD Rule 2210(c)(8)(B).

[80] *See* proposed FINRA Rule 2210(c)(7)(L).

[81] *See* NASD Rule 2210(c)(8)(G).

[82] *See* proposed FINRA Rule 2210(c)(7)(H).

[83] *See* Letter from Lisa C. Horrigan, Assistant General Counsel, NASD, to Eileen Ryan, Securities Industry Association, and Sarah Starkweather, The Bond Market Association, dated August 1, 2006.

[84] *See Regulatory Notice* 10–52 (October 2010).

[85] *See* proposed FINRA Rule 2210(c)(7)(F).

SIFMA recommended that FINRA add a filing exclusion for general investment pieces that discuss an investment strategy but do not recommend or promote a particular product or service of a member. FINRA has revised the proposal to exclude retail communications that do not make investment recommendations or promote a member's products or services. However, depending on the facts and circumstances, a retail communication that discusses investment strategies may in fact be making investment recommendations or promoting a member's products or services.

Filing Exemptions

NASD Rule 2210(c)(10) and FINRA Rule 2210(c)(9) of the *Notice* proposal permitted FINRA to exempt a member from the pre-use filing requirements of paragraph (c)(1)(A) for good cause shown. As discussed above, FINRA has revised the principal review and approval requirements to authorize FINRA to grant an exemption from the principal approval requirements of paragraph (b)(1)(A) for retail communications for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of Rule 2210, the protection of investors, and the public interest. FINRA is similarly revising proposed paragraph (c)(9) to authorize FINRA to exempt a specific category of retail communications from the filing requirements under the same circumstances described with respect to the principal approval exemptive authority.

Other Filing Issues

NPHI requested that FINRA revise its filing requirements to be triggered off the date a registered principal approves a communication, rather than the date a member first uses the communication, since a member may not know the exact date of first use. FINRA disagrees with this recommendation since such a standard would allow members to delay filing a communication indefinitely until a principal approved it. Moreover, FINRA believes that it is important for members to keep records of when a communication is used.

T. Rowe commented that members should be allowed to file retail communications within 15 business days of first use, rather than 10 business days. FINRA disagrees with this recommendation since allowing members to file 15 business days after the date of first use would create too long a period between the first date a member distributes its communication and the first date FINRA has an opportunity to review the communication.

Proposed FINRA Rule 2210(c)(3)(A) requires a member that files a retail communication that includes an investment company performance ranking or comparison to include a copy of the ranking or comparison used in the communication. T. Rowe recommended that members be allowed to submit one performance ranking backup document and refer to that document in future filings. FINRA does not agree with this comment, since Department staff need the ranking or comparison used in a retail communication when conducting their review, and reference to a ranking document contained in a prior filing would slow the process.

Content Standards

General Comments

FINRA Rule 2210(d)(1)(F) in the *Notice* proposal generally prohibited communications from predicting or projecting performance, but permitted a hypothetical illustration of mathematical principles as long as it does not predict or project performance. TD Ameritrade commented that this provision should be revised to permit examples of hypothetical transactions (such as the maximum gain or loss that would occur based on an assumed change in market price), as long as the assumptions are disclosed. FINRA does not believe the provisions should be changed in this regard. If a hypothetical example is an illustration of mathematical principles, it would be permitted. If, however, it is really a projection of performance of a particular investment, FINRA believes this practice should not be allowed.

FINRA does believe, however, that proposed paragraph (d)(1)(F) needs to be clarified to indicate the circumstances under which a projection of performance is permitted: in an investment analysis tool, or a written report produced by such a tool, as permitted under proposed FINRA Rule 2214, and a price target in a research report on debt or equity securities, subject to certain conditions. FINRA has revised proposed paragraph (d)(1)(F) to reflect these exceptions.

FINRA Rule 2210(d)(3)(B) in the *Notice* proposal required all retail communications and correspondence to reflect any relationship between the member and any non-member or individual who is also named. TD Ameritrade recommended that this provision be revised to require such a disclosure only where a relationship exists. FINRA believes no change is necessary, since the paragraph requires a communication to ''reflect any relationship between the member and any non-member or individual who is also named.'' If no relationship exists, no disclosure is required.

FINRA Rule 2210(d)(4)(C)(iii) in the *Notice* proposal provided that, in a comparative illustration of the mathematical principles of tax-deferred versus taxable compounding, the illustration may reflect an actual state income tax rate, provided that the communication is used only with investors that reside in the identified state. TD Ameritrade commented that this provision should be revised to allow the use of an actual state income tax rate as long as the material clearly discloses that the rate only applies to residents of a particular state. FINRA has revised this provision to allow illustrations to reflect an actual state income tax rate if it prominently discloses that the illustration is applicable only to investors that reside in the identified state.

FINRA also has revised the disclosure requirements in proposed FINRA Rule 2210(d)(4)(vii) for such comparative illustrations. Illustrations additionally must disclose the degree of risk in the investment's assumed rate of return, including a statement that the assumed rate of return is not guaranteed, and the possible effect of investment losses on the relative advantage of the taxable versus tax-deferred investments.

Disclosure of Expenses in Fund Performance Advertising

FINRA Rule 2210(d)(5) in the *Notice* proposal required retail communications that present non-money market fund performance data to disclose, among other things, the fund's maximum front-end or back-end sales charges and total annual fund operating expense ratio, gross of any fee waivers or expense reimbursements, as stated in the fee table of the fund's prospectus or annual report, whichever is more current. Currently NASD Rule 2210(d)(3) requires the sales charges and expense ratio simply to reflect the current prospectus, and not a fund's annual report.

Fidelity, the ICI and MBSC opposed the requirement to show the expense ratio from either the prospectus or annual report, whichever is more current. These commenters argued such a requirement would be too burdensome and confusing to investors. American Funds argued that a fund should be allowed to show current expenses based on a fund's annualized monthly expense ratio, and not have to refer to the

prospectus. Vanguard supported the proposed change, but recommended that the rule allow members to show the expense ratio from a fund's prospectus if it reflects the fund's reasonable expectation of the current year's expenses.

FINRA had made this proposed change based on earlier industry input that members should be allowed to show expenses from an annual report if it is more current than the prospectus. However, in light of comments received on the *Notice* proposal and the importance for expense disclosure to be comparable among funds, FINRA is retaining the standard reflected in NASD Rule 2210(d)(3), and requiring sales charges and expense ratios to reflect a fund's current prospectus.

The CAI requested confirmation that this disclosure requirement does not apply to the presentation of performance of an underlying investment option contained in a variable insurance product communication. FINRA agrees the provision does not apply to such communications.

FINRA Rule 2210(d)(5)(B) in the *Notice* proposal required a print advertisement to disclose standardized performance and expense-related information in a prominent text box. Fidelity, the ICI and MBSC requested confirmation that this requirement only applies to print advertisements and not other forms of retail communications, such as Web sites. The ICI and MBSC also recommended that FINRA eliminate the text box requirement and replace it with a prominence requirement applicable to all retail communications.

Consistent with its application of NASD Rule 2210(d)(3), FINRA confirms that the text box requirement only applies to print advertisements. FINRA disagrees however, with the recommendation to eliminate the text box requirement for print advertisements. FINRA created this requirement due to past abuses in which non-standardized performance was prominently displayed in print advertisements, while disclosures regarding standardized performance and expenses were placed in footnotes. FINRA believes that this requirement has helped to prevent this kind of misleading presentation since the rule was adopted.

Recommendations

FINRA Rule 2210(d)(7)(A) in the *Notice* proposal required retail communications, correspondence and public appearances to contain certain disclosures if the communication included a recommendation of securities. The communication would have to disclose if the member was making a market in the security (or an underlying option or future), if the member or its associated person will sell or buy the security from customers on a principal basis, that the member or any associated person with the ability to influence the substance of the communication has a financial interest in the recommended security, and if the member was manager or co-manager of a public offering of any securities of the recommended issuer in the past 12 months.

Cornell and PIABA both opposed limiting disclosures of financial interests to the member and associated persons with the ability to influence the substance of the communication. These commenters felt the associated person standard was too narrow and vague. Fidelity recommended that the disclosure standard for associated persons should be limited to persons who are direct employees of the member or are registered with the member, and who are directly and materially involved in the preparation of the communication. Fidelity and Morgan commented that disclosure should not be required unless an employee has a direct and material financial interest in the recommended security. This would exclude small investments and investments through mutual funds.

Morgan, SIFMA and WilmerHale commented that it would be impossible for a member to track which associated persons have the ability to influence the substance of a communication, and that FINRA must provide more guidance as to which associated persons the disclosure requirements would apply. The FSI inquired as to whether the disclosure standard would apply to a supervisor of a registered representative who emails a securities recommendation to a customer. SIFMA commented that the disclosure requirement should be limited to the member and its officers and partners, and that the rule permit generic, non-specific disclosures regarding financial interests, market making and underwriting activities.

Morgan, SIFMA and WilmerHale commented that the provision not apply to correspondence. WilmerHale also urged that the proposed rule exclude retail communications and public appearances by research analysts, since these situations are already covered by NASD Rule 2711.

In response to these comments, FINRA has revised proposed paragraph (d)(7)(A). First, paragraph (d)(7)(A) no longer applies to correspondence. Given that correspondence may not be delivered to more than 25 retail investors within a 30-calendar-day period, FINRA believes that it is not necessary to include the extensive disclosure required for retail communications in communications sent to a more limited audience.

Second, FINRA has added a requirement that a recommendation of securities have a reasonable basis. This requirement is consistent with NASD IM–2210–1(6)(A).

Third, FINRA has modified the requirement to disclose the financial interests of any associated person with the ability to influence the substance of the communication. Instead, the disclosure requirement will apply to any associated person with the ability to influence the ''content'' of the communication. While this modification is minor, FINRA believes that it will help clarify which associated persons must disclose their financial interests. FINRA continues to believe that persons who influence the content of a communication that includes a recommendation have a material conflict of interest that should be disclosed if the person also has a financial interest in the recommended security.

Fourth, the disclosure requirement excludes financial interests that are ''nominal.'' This revision makes the rule consistent with the current disclosure requirements for advertisements and sales literature that include securities recommendations under NASD IM 2210–1(6)(A)(ii).

Fifth, FINRA has excluded from this disclosure requirement public appearances by research analysts, since they are already covered under NASD Rule 2711. The proposed language also excludes research reports for the same reason.

Proposed FINRA Rules 2210(d)(7)(C) revised the current disclosure requirements for communications that contain past specific recommendations.[86] The revised provisions more closely reflect the disclosure standards applicable to advertisements of investment advisers that contain past specific recommendations. Wells Fargo supported this change, but urged FINRA also to adopt the SEC's interpretations of the Investment Advisers Act regarding recommendations. While FINRA may look to past SEC interpretations of its rules for guidance, FINRA declines to adopt any of the SEC interpretations of the Investment Advisers Act regarding

[86] *See* NASD IM–2210–6(C) and (D).

recommendations for purposes of this filing.

Other Comments

Fidelity, the ICI and Vanguard requested clarification as to whether a member is responsible for content posted by third parties on a member's Web site. These commenters also recommended that FINRA develop interpretive guidance concerning the principles that members should follow when developing communications intended for customers' mobile electronic devices. For example, FINRA should address how members may meet various disclosure requirements, such as the requirement to disclose a member's name, fees, expenses and standardized performance information.

FINRA previously addressed the issue of third-party content in *Regulatory Notice* 10–06. FINRA also agrees that issues related to communications intended for mobile electronic devices is important and will consider further guidance or rulemaking as issues arise, but does not believe this proposed rulemaking is the appropriate vehicle to address all issues raised by new technologies. In the past, when FINRA has reviewed a member's advertisement or sales literature that includes a bond fund's 30-day yield, and the fund's affiliates have subsidized or reimbursed the fund's expenses, FINRA staff has required the member also to disclose the fund's yield that would have occurred had expenses not been subsidized (the ''unsubsidized yield''). FINRA has imposed this requirement based on language contained in the SEC's 1988 adopting release for Rule 482 under the Securities Act.[87] The ICI and T. Rowe both objected to this requirement and requested that FINRA clarify that disclosure of the unsubsidized yield is unnecessary in such circumstances. Because this issue involves an interpretation of Rule 482 under the Securities Act, FINRA declines to provide guidance through the proposed rule change.

Public Appearances

Proposed FINRA Rule 2210(f) in the *Notice* proposal sets forth the content and supervision requirements for members and associated persons that participate in seminars, forums or radio or television interviews. Paragraph (f)(1) specifies that the member or associated person must follow the content standards of paragraph (d)(1), and if the member or associated person recommends a security, paragraph (d)(7).

Fidelity, Invesco, the ICI and Morgan opposed requiring associated persons that make recommendations in public appearances to meet the content standards of paragraph (d)(7). These commenters argued that it would be impossible to monitor or supervise. Invesco also argued that this requirement creates an uneven playing field between broker-dealers and investment advisers, since investment advisers do not have a similar disclosure requirement.

FINRA disagrees with the comments that the disclosure requirements regarding recommendations would be impossible to monitor or supervise. Members that employ research analysts already must meet similar requirements under NASD Rule 2711. Members could impose similar policies and procedures for their associated persons who intend to recommend securities in public appearances. The ICI requested clarification that, if a member sponsors a seminar or forum, the member is responsible only for its own presentation and not those of others. This issue will be a matter of facts and circumstances, but generally a member is only responsible for the communications of the member or its associated persons, unless the member or its associated persons are entangled with or adopt others' communications.

NPHI requested clarification as to whether a discussion of a general product category constitutes a recommendation for purposes of the public appearance disclosure requirements. If a member or associated person merely discusses a general product category without recommending a particular security, the disclosure requirements would not apply. Similarly, T. Rowe asked whether the mere reference to a security is a recommendation. Generally the mere reference to a security is not a recommendation, but this issue will be a matter of facts and circumstances.

Under NASD Rule 2210, ''public appearance'' is a separate category of communications with the public.[88] Proposed FINRA Rule 2210 does not retain ''public appearance'' as a separate category of ''communications with the public.'' T. Rowe suggested that FINRA retain its definition of ''public appearance,'' since otherwise an email to a member of the media or private conversation might be viewed as a public appearance. FINRA does not believe this is necessary. Proposed paragraph (f)(1) makes clear that it applies only to ''a seminar, forum, radio or television interview or * * * public appearances or speaking activities * * *'' An email or private conversation would not fall within this description.[89] In addition, the language used to describe a public appearance in proposed paragraph (f)(1) is similar to the current definition of ''public appearance'' under NASD Rule 2210(a)(5).

Proposed paragraph (f)(2) would require members to adopt written procedures that are appropriate to a member's business, size, structure, and customers to supervise its associated persons' public appearances. The procedures must include, among other things, surveillance and follow-up to ensure that such procedures are implemented and adhered to. T. Rowe requested clarification as to what level of surveillance and follow-up is required, particularly for one-time appearances. T. Rowe also commented that there should be an exception if a member approves appearances in advance. FINRA does not believe it would be appropriate to pre-determine how a member must supervise its associated persons' public appearances, since this will vary depending on a member's business model, size, and the type of public appearance involved. FINRA also does not agree that a member should have no obligation to review public appearances after the fact for compliance with applicable rules as long as it approves the appearance in advance.

FINRA is making one additional change to the proposed paragraph (f) in light of other changes to the proposed rule. Paragraph (f)(1) of the *Notice* proposal also covered ''interactive electronic forums'' within its description of a public appearance. To the extent participation in an interactive electronic forum takes the form of a written communication disseminated through an interactive Web site, FINRA considers such a communication to be a retail communication rather than a public appearance. However, as discussed above, proposed FINRA Rule 2210(b)(1)(D)(ii) allows a member to supervise and review retail communications that are posted on online interactive electronic forums in the same manner as required for supervising and reviewing correspondence. Accordingly, FINRA has deleted ''(including an interactive electronic forum)'' from proposed paragraph (f)(1).

[87] *See* Securities Act Release No. 6753 (February 2, 1988), 53 FR 3868 (February 10, 1988) (Order Approving File No. S7–23–86), p. 37.

[88] *See* NASD Rule 2210(a)(5).

[89] Moreover, proposed paragraph (f)(1) expressly excludes correspondence from the description of a public appearance.

Investment Analysis Tools

Proposed FINRA Rule 2214 of the *Notice* proposal codifies largely without change current NASD IM–2210–6 (Requirements for the Use of Investment Analysis Tools).[90] Fidelity, the ICI, MBSC and T. Rowe commented that Rule 2214 should be revised to allow members to present projections of performance in retail communications even in cases where the tool is not interactive with customers. These commenters argue that a firm should be permitted to show projected performance of an investment in a communication that is not based on information provided by a customer independently or with the assistance of the member firm. T. Rowe also commented that members should be allowed to use the data generated by an investment analysis tool in sales material for target date funds provided that these illustrations are limited to a discussion of a fund's investment strategy and not used to project performance.

FINRA disagrees with the comment that proposed Rule 2214 should be revised to eliminate the requirement that an investment analysis tool be interactive. The purpose of NASD IM–2210–6 and proposed FINRA Rule 2214 is to allow members to use interactive tools with customers to show the likelihood of various investment outcomes under different scenarios, thereby serving as an additional resource to investors to evaluate their specific investment choices. It is not to allow the use of performance projections in retail communications in all circumstances as long as an investment analysis tool is used to create the projections. In the case of retail communications concerning target date funds that do not include projections, reliance on the proposed rule is unnecessary, since it only applies to retail communications that contain projections.

Supplementary Material 2214.06 provides that a retail communication that contains only an incidental reference to an investment analysis tool need not include the disclosures required by the proposed rule and would not need to be filed with the Department. Vanguard commented that proposed Rule 2214 should be revised to allow members not to include all of the proposed rule's required disclosures as long as the communication does not include the tool itself or any data or results produced by the tool.

FINRA agrees that, under these circumstances, some of the proposed rule's required disclosures, such as those required by paragraph (c)(1) (a description of the tool's methodology) or paragraph (c)(3) (certain disclosures in situations in which the tool analyzes only a limited range of investments), are unnecessary. FINRA believes however, that a retail communication that refers to an investment analysis tool in more detail than an incidental reference but does not provide access to the tool or the results generated by the tool must disclose that results may vary with each use (as required by paragraph (c)(2)) and the warning required by paragraph (c)(4) that the projections generated by the tool are hypothetical and are not guarantees of future results. FINRA has revised proposed Rule 2214.06 accordingly.

Security Futures

Proposed FINRA Rule 2215 (Guidelines for Communications with the Public Regarding Security Futures) is the successor to current NASD IM–2210–7. TD Ameritrade commented that paragraph (b)(1)(A)(iii), which prohibits projections of performance in communications used prior to the delivery of a security futures risk disclosure statement, should be modified to permit examples of hypothetical transactions. This comment is similar to another TD Ameritrade comment on proposed FINRA Rule 2210(d)(1)(F) (which also prohibits performance projections), and FINRA's response is the same as discussed above.

Proposed paragraph (b)(2)(A)(iv) requires any communication concerning a security future to include a statement that supporting documentation for any claims, comparisons, recommendations, statistics or other technical data will be supplied upon request. TD Ameritrade commented that FINRA should clarify that this disclosure requirement only applies if a communication actually includes a claim, comparison, recommendation, statistics or other technical data. While this issue will be a matter of facts and circumstances, FINRA agrees that no such disclosure would be required if a communication does not contain any statement or data that requires supporting documentation.

Transition Period

Fidelity, Invesco and NPHI requested that FINRA allow members at least six months before having to comply with the new rules. The ICI suggested a compliance date of 10 business days after the second quarter ending following adoption of the final rule changes. PSD requested nine months' lead time, and suggested that members should be permitted to ''grandfather'' and continue to use communications that were filed under the current rules. Alternatively, members should have a minimum of two years from the date the new rules become effective to continue to use communications filed under the existing rules.

FINRA plans on publishing a *Regulatory Notice* no later than 90 days following SEC approval of the rule changes. The implementation date will be no later than 365 days following SEC approval. In establishing the implementation schedule, FINRA will consider members' need to adopt and implement new policies and procedures necessary to comply with the new rules.

In most cases, FINRA expects that communications that are in compliance with the current communication rules will continue to be in compliance with the new rules, and thus ''grandfathering'' of past filed material will be unnecessary. To the extent a member has questions about whether a previously filed communication continues to be compliant under the new rules, the member should discuss this issue with its assigned Department advertising analyst.

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

[90] Certain of NASD IM–2210–6's text that appears either in the Interpretive Material itself or in footnotes to the Interpretive Material have been moved to Supplementary Material.

Number SR–FINRA–2011–035 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2011–035. 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 such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2011–035 and should be submitted on or before August 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[91]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19645 Filed 8–2–11; 8:45 am]

BILLING CODE 8011–01–P

[91] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 7476]

U.S. Advisory Panel to the U.S. Section of the North Pacific Anadromous Fish Commission; Notice of Renewal

The Department of State has renewed the Charter of the U.S. Advisory Panel to the U.S. Section of the North Pacific Anadromous Fish Commission (NPAFC) for another two years.

The NPAFC was established by the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, signed on February 12, 1992, by Canada, Japan, the Russian Federation, and the United States, and entered into force on February 16, 1993. The U.S. Advisory Panel will continue to work with the U.S. Section to promote the conservation of anadromous fish stocks, particularly salmon, throughout their migratory range in the North Pacific Ocean, as well as ecologically related species.

The U.S. Section of the Commission is composed of three Commissioners who are appointed by the President. Each Commissioner is appointed for a term not to exceed 4 years, but is eligible for reappointment. The Secretary of State, in consultation with the Secretary of Commerce, may designate alternate commissioners. The Advisory Panel to the U.S. Section is composed of 14 members, 11 of whom are appointed by the Secretary in consultation with the Secretary of Commerce. Advisory Panel members serve for a term not to exceed 4 years, and may not serve more than two consecutive terms.

The Advisory Panel will continue to follow the procedures prescribed by the Federal Advisory Committee Act (FACA). Meetings will continue to be open to the public unless a determination is made in accordance with Section 10 of the FACA, 5 U.S.C. 552b(c)(1) and (4), that a meeting or a portion of the meeting should be closed to the public. Notice of each meeting will continue to be provided for publication in the **Federal Register** as far in advance as possible prior to the meeting.

For further information on the renewal of the Advisory Panel, please contact John Field, Office of Marine Conservation in the Department of State, (202) 647–3263.

Dated: July 8, 2011.

David A. Balton,

Deputy Assistant Secretary for Oceans and Fisheries, Department of State.

[FR Doc. 2011–19655 Filed 8–2–11; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in Alaska

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for judicial review of actions by FHWA.

SUMMARY: This notice announces actions taken by the FHWA that are final within the meaning of 23 U.S.C. 139(l)(1). The action relates to a proposed highway project in Hyder, State of Alaska. Those actions grant approval for the project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the listed highway project will be barred unless the claim is filed on or before January 30, 2012. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Mr. Alex Viteri, Senior Transportation Engineer, FHWA Alaska Division, P.O. Box 21648, Juneau, Alaska 99802–1648; office hours 8 a.m. to 4:30 p.m. (AST), phone (907) 586–7544; e-mail *Alex.Viteri@dot.gov.* You may also contact Jane Gendron, DOT&PF Southeast Region, Regional Environmental Manager, Alaska Department of Transportation and Public Facilities, 6860 Glacier Highway, P.O. Box 112506, Juneau, Alaska 99811–2506; office hours 8:30 a.m. to 5 p.m. (AST), phone (907) 465–4499, e-mail *jane.gendron@alaska.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA has taken final agency actions subject to 23 U.S.C. 139(l)(1) by issuing approvals for the following highway project in the State of Alaska: Project No. MGS–0003(113)/69070; Project Location: The project begins on Premier Avenue in the town of Hyder, Alaska and continues along the Hyder Causeway and trestle to Harbor Island in Portland Canal, a distance of 0.7 miles. Hyder is 75 air miles northeast of Ketchikan, Alaska and about 640 air miles northwest of Seattle, Washington. Project type: The project would reconstruct the surface approach (Premier Avenue and filled causeway) and replace the wooden trestle linking Hyder, Alaska to its marine transportation facility on Harbor Island.

The actions by the Federal agency on the project, and the laws under which

such actions were taken, are described in the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) issued for the project, approved on July 11, 2011 and in other documents in the FHWA project files or the State of Alaska Department of Transportation & Public Facilities. The EA, FONSI, and other documents from the FHWA project records files are available by contacting the FHWA or the State of Alaska Department of Transportation & Public Facilities at the addresses provided above.

This notice applies to all FHWA decisions and approvals on the project as of the issuance date of this notice and all laws and Executive Orders under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act, 42 U.S.C. 7401–7671(q).

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. 319.

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) et seq.]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act, 33 U.S.C. 1251–1377 (Section 404, Section 401, Section 319); Land and Water Conservation Fund (LWCF), 16 U.S.C. 4601–4604; Safe Drinking Water Act (SDWA), 42 U.S.C. 300(f)–300(j)(6); Rivers and Harbors Act of 1899, 33 U.S.C. 401–406; Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287; Emergency Wetlands Resources Act, 16 U.S.C. 3921, 3931; TEA–21 Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133(b)(11); Flood Disaster Protection Act, 42 U.S.C. 4001–4128.

8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1).

Issued on: July 25, 2011.

David C. Miller,

Division Administrator, Juneau, Alaska.

[FR Doc. 2011–19641 Filed 8–2–11; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in Washington

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for judicial review of actions by FHWA and other Federal agencies.

SUMMARY: This notice announces actions taken by FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to the I–405, Bellevue to Lynnwood Improvement Project, located in the cities of Bellevue; Kirkland, Bothell, Lynnwood, and the counties of King and Snohomish along Interstate (I)–405 in the State of Washington. These actions grant licenses, permits, and approvals for the project.

DATES: By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(1). A claim seeking judicial review of the Federal agency actions on the listed highway project will be barred unless the claim is filed on or before January 30, 2012. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Pete Jilek, Urban Area Engineer, Federal Highway Administration, 711 S. Capitol Way #501, Olympia, Washington, 98501; *telephone:* (360) 753–9550; and *e-mail: pete.jilek@.dot.gov.* The FHWA Washington Division Urban Area Engineer's regular office hours are between 6 a.m. and 3:30 p.m. (Pacific Time). You may also contact William Jordan, I–405 Environmental Manager, Washington State Department of Transportation, 600–108th Avenue NE., Suite 405, Bellevue, Washington, 98004; *telephone:* (425) 457–0642; and *e-mail: william.jordan@i405.wsdot.wa.gov.* The I–405 Corridor Program's regular office hours are between 8 a.m. and 5 p.m. (Pacific Time).

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the following highway project in the State of Washington: I–405, Bellevue to Lynnwood Improvement Project. The Project begins on I–405 at NE. 6th Street in Bellevue (milepost [MP] 13.5) at the southern limit, and extends approximately 17 miles to I–5 in Lynnwood (MP 30.0) at the northern limit.

This Project complements the I–405, SR 520 to SR 522—Kirkland Nickel Project, the NE. 195th Street to SR 527 Auxiliary Lane Project (opened in 2010); and the NE. 8th Street to SR 520 Braided Ramps Project (scheduled to open in 2012). The Bellevue to Lynnwood Improvement Project description assumes full completion of the Kirkland Nickel Project, the first stage of which was opened to traffic in late 2007. The Bellevue to Lynnwood Improvement Project will provide:

- One additional northbound lane between NE. 124th Street and SR 522;
- Braided ramps between the I–405 northbound on-ramp from NE. 160th Street and the northbound I–405 off-ramp to SR 522;
- Southbound transit shoulders between SR 522 and NE. 160th Street and between SR 527 and NE. 195th Street;
- New northbound and southbound structures over NE. 132nd Street and a new northbound structure over the railroad for the I–405 northbound off-ramp to NE. 124th Street;
- Small amounts of additional widening, between four and eight feet, at several locations for buffers, wider shoulders, tolling equipment, Washington State Patrol enforcement areas, and WSDOT maintenance pull-outs; and
- Minor upgrades to pedestrian facilities in some interchange areas.

WSDOT will also implement an express toll lane system. The system will provide two express toll lanes in each direction between NE. 6th Street and SR 522 and one express toll lane in each direction between SR 522 and I–5.

These actions by the Federal agencies, and the laws under which such actions were taken, are described in the May 2011 Environmental Assessment (EA) and in the July 20, 2011, Finding of No Significant Impact (FONSI), and in other documents in the FHWA administrative record. The EA, FONSI and other documents in the FHWA administrative record are available by contacting FHWA or WSDOT at the addresses provided above. The EA can be viewed and downloaded from the project Web site at *http://www.wsdot.wa.gov/projects/i405* or viewed at public libraries in the project area.

This notice applies to all Federal agency decisions on the project as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act, as amended [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544]; Anadromous Fish Conservation Act [16 U.S.C. 757(a)–757(g)]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)]; Magnuson-Stevenson Fishery Conservation and Management Act of 1976, as amended [16 U.S.C. 1801 *et seq.*].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archaeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archaeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act [7 U.S.C. 4201–4209]; the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended [42 U.S.C. 61].

7. *Wetlands and Water Resources:* Clean Water Act, 33 U.S.C. 1251–1377 (Section 404, Section 401, Section 319); Coastal Zone Management Act [16 U.S.C. 1451–1465]; Land and Water Conservation Fund [16 U.S.C. 4601–4604]; Safe Drinking Water Act [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(m), 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601–9675]; Superfund Amendments and Reauthorization Act of 1986 [PL 99–499]; Resource Conservation and Recovery Act [42 U.S.C. 6901–6992(k)].

9. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1).

Issued on: July 27, 2011.

Peter A. Jilek,

Urban Area Engineer, Olympia, Washington.

[FR Doc. 2011–19558 Filed 8–2–11; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

West Texas & Lubbock Railway

[Waiver Petition Docket Number FRA–2011–0019]

The West Texas & Lubbock Railway (WTLC) seeks a waiver of compliance from certain provisions of the Safety Glazing Standards, specifically 49 CFR Section 223.13, *Requirements for existing cabooses.* WTLC has petitioned for one caboose, built in 1960 for the Great Northern Railroad, as their X–40. There have been no accidents and/or incidents attributed directly or indirectly to window glazing failures in this equipment while under current ownership. WTLC states that Caboose WTLC X–40 is operated as a shove platform on freight and excursion passenger trains where a run-around track is unavailable. This improves safety, as it eliminates the need for railroad employees to ride the side of freight equipment on long shoving or backup movements. Specifically, this car operates on WTLC's 106.64 miles of track from Lubbock to Seagraves and to Whiteface, TX.

WTLC also states that the caboose will not be interchanged with any other railroad, and will be operated at a speed limit of 25 mph for freight and 30 mph for excursion passenger trains. It typically operates no more than 40 miles in a day. WTLC has issued a Special Notice informing all personnel of the 49 CFR 215.13 condition of this caboose.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2011–0019) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review U.S. Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on July 28, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2011–19592 Filed 8–2–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

West Texas & Lubbock Railway

[Waiver Petition Docket Number FRA–2011–0006]

The West Texas & Lubbock Railway (WTLC) seeks a waiver of compliance from certain provisions of the Railroad Freight Car Safety Standards, specifically 49 CFR 215.303, which requires stenciling to indicate a restricted car. WTLC states that Caboose WTLC X–40 is operated as a shove platform on freight and excursion passenger trains where a run-around track is unavailable. This improves safety, as it eliminates the need for railroad employees to ride the side of freight equipment on long shoving or backup movements. Specifically, this car operates on WTLC's 106.64 miles of track from Lubbock to Seagraves and to Whiteface, TX.

WTLC states that this caboose is completely restored to its ''as delivered'' appearance as Great Northern X–40, with a sound carbody. The caboose will not be interchanged with any other railroad and will be operated at a speed limit of 25 mph for freight and 30 mph for excursion passenger trains. It typically operates no more than 40 miles in a day. Since Caboose WTLC X–40 is painted and stenciled to reflect its historic (Great Northern) appearance, stenciling the car to meet 49 CFR 215.303 requirements would detract from the historical and educational impression this car is intended to preserve. WTLC has issued a special notice informing all personnel of the 49 CFR 215.203 restricted condition of this caboose.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2011–0006) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review U.S. Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC on July 28, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2011–19593 Filed 8–2–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. 2011–0045]

Agency Information Collection Activity Under OMB Review

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: The Federal Transit Administration invites public comment about our intention to request the Office of Management and Budget's (OMB) approval for the following new information collection:

49 U.S.C. Section 5308—Clean Fuels Grant Program

The information collected will support the development and deployment of clean fuel and advanced propulsion technologies for transit buses. To meet program oversight responsibilities, FTA needs information on the operation and performance of clean fuel technology buses. The **Federal Register** Notice with a 60-day comment period soliciting comments was published on May 6, 2011.

DATES: Comments must be submitted before September 2, 2011. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: LaStar Matthews, Office of Administration, Office of Management Planning, (202) 366–2295.

SUPPLEMENTARY INFORMATION:

Title: 49 U.S.C. Section 5308—Clean Fuels Grant Program (*OMB Number: 2132–NEW*).

Abstract: The Section 5308 Clean Fuels Grant Program was initiated as a formula program under the Transportation Equity Act for the 21st Century (TEA–21) in June 1998. The program was reauthorized in August 2005 under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) as a grant program. The program supports the development and deployment of clean fuel and advanced propulsion technologies for transit buses by providing funds for clean fuel vehicles and facilities. To meet program oversight responsibilities, FTA needs information on the operations and performance of clean fuel technology buses to help assess the reliability, benefits and costs of these technologies compared to conventional vehicle technologies.

Estimated Total Annual Burden: 1,644 hours.

ADDRESSES: All written comments must refer to the docket number that appears at the top of this document and be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725—17th Street, NW., Washington, DC 20503, *Attention:* FTA 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.

Issued on: July 28, 2011.

Ann M. Linnertz,

Associate Administrator for Administration.

[FR Doc. 2011–19658 Filed 8–2–11; 8:45 am]

BILLING CODE

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. 2011–0044]

Agency Information Collection Activity Under OMB Review

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: The Federal Transit Administration invites public comment about our intention to request the Office of Management and Budget's (OMB) approval to renew the following information collection:

Bus Testing Program

The information collected is necessary to ensure that buses have been tested at the Bus Testing Center for maintainability, reliability, safety, performance, structural integrity, fuel economy, emissions and noise. The **Federal Register** Notice with a 60-day comment period soliciting comments was published on May 10, 2011.

DATES: Comments must be submitted before September 2, 2011. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: LaStar Matthews, Office of Administration, Office of Management Planning, (202) 366–2295.

SUPPLEMENTARY INFORMATION:

Title: Bus Testing (*OMB Number: 2132–0550*).

Abstract: 49 U.S.C. Section 5323(c) provides that no federal funds appropriated or made available after September 30, 1989, may be obligated or expended for the acquisition of a new bus model (including any model using alternative fuels) unless the bus has been tested at the Bus Testing Center (Center) in Altoona, Pennsylvania. 49 U.S.C. Section 5318(a) further specifies that each new bus model is to be tested for maintainability, reliability, safety, performance (including braking performance), structural integrity, fuel economy, emissions, and noise.

The operator of the Bus Testing Center, the Pennsylvania Transportation Institute (PTI), has entered into a cooperative agreement with FTA. PTI operates and maintains the Center, and establishes and collects fees for the testing of the vehicles at the facility. Upon completion of the testing of the vehicle at the Center, a test report is provided to the manufacturer of the new bus model. The bus manufacturer certifies to a FTA grantee that the bus the grantee is purchasing has been tested at the Center. Also, grantees about to purchase a bus use this report to assist them in making their purchasing decisions. PTI maintains a reference file for all the test reports which are made available to the public.

Estimated Total Annual Burden: 404 hours.

ADDRESSES: All written comments must refer to the docket number that appears at the top of this document and be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725—17th Street, NW. Washington, DC 20503, *Attention:* FTA 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.

Issued: July 28, 2011.

Ann M. Linnertz,

Associate Administrator for Administration.

[FR Doc. 2011–19660 Filed 8–2–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2011 0101]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel XECULINK 1.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2011–0101 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084, April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the

vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before September 2, 2011.

ADDRESSES: Comments should refer to docket number MARAD–2011–0101. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, E-mail *Joann.Spittle@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel XECULINK 1 is:

Intended Commercial Use of Vessel: ''Transportation of passengers to and from locations on the San Francisco Bay.''

Geographic Region: ''California.''

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: July 21, 2011.

Christine Gurland,

Secretary, Maritime Administrator.

[FR Doc. 2011–19599 Filed 8–2–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2011 0100]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel SIMA.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2011–0100 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before September 2, 2011.

ADDRESSES: Comments should refer to docket number MARAD–2011–0100. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, E-mail Joann.Spittle@dot.gov.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel SIMA is:

Intended Commercial Use of Vessel: ''Vessel Charters.''

Geographic Region: ''Florida, Georgia, South & North Carolina, Virginia, Delaware, Maryland, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, Maine.''

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: July 21, 2011.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2011–19598 Filed 8–2–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2011 0102]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel CONCH WEST.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application

is given in DOT docket MARAD–2011–0102 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084, April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before September 2, 2011.

ADDRESSES: Comments should refer to docket number MARAD 2011 0102. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, E-mail Joann.Spittle@dot.gov.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel CONCH WEST is:

Intended Commercial Use of Vessel: ''Day and overnight charters with paid passengers intended for sail training to promote seamanships and navigation.''

Geographic Region: ''Florida, Maine.''

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: July 21, 2011.

Christine Gurland,

Secretary, Maritime Administration.

[FR Doc. 2011–19600 Filed 8–2–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2011–0022]

Agency Information Collection Activity Under OMB Review; Reports, Forms and Record Keeping Requirements

AGENCY: National Highway Traffic Safety Administration, U.S. Department of Transportation.

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 March 22, 2011 [76 FR 16035]. No comments were received.

This document describes the collection of information for which NHTSA intends to seek OMB approval. The collection of information described is the ''Side Impact Phase in Reporting Requirements—Part 597.'' (OMB Control Number: 2127–0558)

DATES: Comments must be submitted on or before September 2, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher J. Wiacek at U.S. Department of Transportation, NHTSA, 1200 New Jersey Avenue, SE., West Building Room W43–419, NVS–112, Washington, DC 20590. Mr. Christopher J. Wiacek's telephone number is (202) 366–4801 and fax number is (202) 366–7002.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: Side Impact Phase in Reporting Requirements—Part 597

OMB Control Number: 2127–0558

Type of Request: Extension of a currently approved collection.

Abstract: 49 U.S.C. 30111 authorizes the issuance of Federal motor vehicle safety standards (FMVSSs) and regulations. The agency, in prescribing a FMVSS or regulations, considers available relevant motor vehicle safety data, and consults with other agencies, as it deems appropriate. Further, the statute mandates that in issuing any FMVSS or regulation, the agency considers whether the standard or regulation is ''reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed,'' and whether such a standard will contribute to carrying out the purpose of the Act.

The Secretary is authorized to invoke such rules and regulations, as deemed necessary to carry out these requirements. Using this authority, on September 11, 2007 the agency published a final rule (73 FR 51908) upgrading the requirements of FMVSS No. 214, ''Side impact protection.'' The final rule contained a collection of information because of the proposed phase-in reporting requirements. The collection of information requires manufacturers of passenger cars, trucks, buses and MPVs with a GVWR of 4,536 kg (10,000 lb) or less, to annually submit a report, and maintain records related to the report, concerning the number of such vehicles that meet the vehicle-to-pole and MDB test requirements of FMVSS No. 214 during the three year phase-in of those requirements. In response to petitions for reconsideration the agency published a final rule (73 FR 32473) extending the phase-in of both the pole and MDB test requirements to four years. The purpose of the reporting and recordkeeping requirements is to assist the agency in determining whether a manufacturer of vehicles has complied with the requirements during the phase-in period.

Affected Public: Businesses.

Estimated Total Annual Burden: 1,260 hours

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 Departments 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 in Washington, DC, on July 28, 2011.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2011–19594 Filed 8–2–11; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Senior Executive Service Performance Review Board

AGENCY: Surface Transportation Board.

ACTION: Notice.

SUMMARY: The Surface Transportation Board (STB) publishes the names of the Persons selected to serve on its Senior Executive Service Performance Review Board (PRB).

FOR FURTHER INFORMATION CONTACT: Paula Chandler, Director of Human Resources, (202) 245–0340.

SUPPLEMENTARY INFORMATION: Title 5 U.S.C. 4314 requires that each agency implement a performance appraisal system making senior executives accountable for organizational and individual goal accomplishment. As part of this system, 5 U.S.C. 4314(c) requires each agency to establish one or more PRBs, the function of which is to review and evaluate the initial appraisal of a senior executive's performance by the supervisor and to make recommendations to the final rating authority relative to the performance of the senior executive.

The persons named below have been selected to serve on STB's PRB.

Leland L. Gardner, Director, Office of the Managing Director; Rachel D. Campbell, Director, Office of Proceedings; Raymond A. Atkins, General Counsel.

Senior Executive Service, Performance Review, Board.

Dated: July 11, 2011.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2011–19605 Filed 8–2–11; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Designation of Six Individuals Pursuant to Executive Order 13224

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of six newly-designated individuals whose property and interests in property are blocked pursuant to Executive Order 13224 of September 23, 2001, ''Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism.''

DATES: The designations by the Director of OFAC of the six individuals identified in this notice, pursuant to Executive Order 13224, are effective on July 28, 2011.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, *tel.:* 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, *tel.:* 202/622–0077.

Background

On September 23, 2001, the President issued Executive Order 13224 (the ''Order'') pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701–1706, and the United Nations Participation Act of 1945, 22 U.S.C. 287c. In the Order, the President declared a national emergency to address grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the September 11, 2001 terrorist attacks in New York, Pennsylvania, and at the Pentagon. The Order imposes economic sanctions on persons who have committed, pose a significant risk of committing, or support acts of terrorism. The President identified in the Annex to the Order, as amended by Executive Order 13268 of July 2, 2002, 13 individuals and 16 entities as subject to the economic sanctions. The Order was further amended by Executive Order 13284 of January 23, 2003, to reflect the creation of the Department of Homeland Security.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in or hereafter come within the United States or the possession or control of United States persons, of: (1) Foreign persons listed in the Annex to the Order; (2) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States; (3) persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order; and (4) except as provided in section 5 of the Order and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to the Order or determined to be subject to the Order or to be otherwise associated with those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order.

On July 28, 2011 the Director of OFAC, in consultation with the Departments of State, Homeland Security, Justice and other relevant agencies, designated, pursuant to one or more of the criteria set forth in subsections 1(b), 1(c) or 1(d) of the Order, six individuals whose property and interests in property are blocked pursuant to Executive Order 13224.

The designees are as follows:

1. AL–'AJMI, 'Ali Hasan 'Ali (a.k.a. AL–'AJAMI, 'Ali Hasan; a.k.a. AL–'AJMI, Abu al-Hassan; a.k.a. AL–'AJMI, 'Ali Hassan 'Ali; a.k.a. AL–YAMI, 'Ali Abu Hasan; a.k.a. AL–YAMI, Hassan; a.k.a. AL–YAMI, Husayn; a.k.a. ''AL–HASSAN, Abu''; a.k.a. ''HASAN, 'Ali bin''); DOB 14 Jan 1979; nationality

Kuwait; Passport 002981367 (Kuwait) (individual) [SDGT]

2. AL–KUWARI, Salim Hasan Khalifah Rashid (a.k.a. AL KAWARI, Salim Hasan Khalifa; a.k.a. AL KUWARI, Salim Hassan Khalifa Rashid; a.k.a. AL–KOWARI, Salim; a.k.a. AL–KUWARI, Salem); DOB 1977; alt. DOB 1978; nationality Qatar (individual) [SDGT]

3. KHAWAR, Abdallah Ghanim Mahfuz Muslim (a.k.a. AL–KHAWAR, Abdullah Ghalib Mahfuz Muslim; a.k.a. AL–KHOWAR, Abdullah; a.k.a. KHAWAR, Abdullah Ghanem Mahfouz Muslim; a.k.a. KHOWAR, Abdullah); DOB 17 Aug 1981; nationality Qatar; Passport 28163402296 (individual) [SDGT]

4. ABD AL–RAHMAN, Atiyah (a.k.a. AL–LIBI, 'Atiyah 'Abd al-Rahman; a.k.a. AL–SHATIWI, Jamal; a.k.a. AL–SHITAYWI, Jamal Ibrahim Muhammad; a.k.a. AL–SHITIWI, Jamal; a.k.a. AL–SHTIWI, Jamal; a.k.a. ''AL–LIBI, Shaykh Mahmud''); DOB 1969; alt. DOB 1965; alt. DOB 1966; alt. DOB 1967; alt. DOB 1957; alt. DOB 1958; alt. DOB 1959; alt. DOB 1960; POB Misrata, Libya; nationality Libya (individual) [SDGT]

5. KHALIL, Ezedin Abdel Aziz (a.k.a. AL–ABADIN, Zayn; a.k.a. AL–SURI, Yaseen; a.k.a. AL–SURI, Yasin; a.k.a. KHALIL, Izz al-Din Abd al-Farid); DOB 1982; POB al-Qamishli, Syria; nationality Syria; ethnicity Kurdish (individual) [SDGT]

6. MUHAMMADI, Umid (a.k.a. MUHAMMADI, Omid; a.k.a. MUHAMMADI, 'Umid 'Abd al-Majid Muhammad 'Aziz; a.k.a. ''AL–KURDI, Abu Sulayman''; a.k.a. ''AL–KURDI, 'Amid''; a.k.a. ''AL–KURDI, Hamza''; a.k.a. ''AL–KURDI, Umid''; a.k.a. ''DARWESH, Arkan Mohammed Hussein''; a.k.a. ''MARIVANI, Shahin''; a.k.a. ''RAWANSARI, Shahin''); DOB 1967; nationality Syria; alt. nationality Iran; ethnicity Kurdish (individual) [SDGT]

Dated: July 28, 2011.

Barbara C. Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2011–19643 Filed 8–2–11; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Small Business/Self Employed Correspondence Exam Toll Free Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Small Business/Self Employed Correspondence Exam Toll Free Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, September 22, 2011.

FOR FURTHER INFORMATION CONTACT: Timothy Shepard at 1–888–912–1227 or 206–220–6095.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Small Business/Self Employed Correspondence Exam Toll Free Project Committee will be held Thursday, September 22, 2011, at 9 a.m. Pacific Time via teleconference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Timothy Shepard. For more information please contact Mr. Shepard at 1–888–912–1227 or 206–220–6095, or write TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174 or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: July 29, 2011.

Shawn Collins,

Director, Taxpayer Advocacy Panel.

[FR Doc. 2011–19679 Filed 8–2–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Small Business/Self Employed Correspondence Exam Practitioner Engagement Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Small Business/Self Employed Correspondence Exam Practitioner Engagement Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, September 28, 2011.

FOR FURTHER INFORMATION CONTACT: Janice Spinks at 1–888–912–1227 or 206–220–6098.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Small Business/Self Employed Correspondence Exam Practitioner Engagement Project Committee will be held Wednesday, September 28, 2011, at 9 a.m. Pacific Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notifications of intent to participate must be made with Ms. Janice Spinks. For more information please contact Ms. Spinks at 1–888–912–1227 or 206–220–6098, or write TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174 or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: July 29, 2011.

Shawn Collins,

Director, Taxpayer Advocacy Panel.

[FR Doc. 2011–19680 Filed 8–2–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Quarterly Publication of Individuals, Who Have Chosen To Expatriate, as Required by Section 6039G

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: This notice is provided in accordance with IRC section 6039G, as amended, by the Health Insurance Portability and Accountability Act (HIPPA) of 1996. This listing contains the name of each individual losing their United States citizenship (within the meaning of section 877(a) or 877A) with respect to whom the Secretary received information during the quarter ending June 30, 2011.

Last name	First name	Middle name/initials
ABDALL	HUSSEIN	
AGGARWAL	ROHIT	
AIGNER	HEIDI	MARIE
ALMEER	ABDULLATIF	A
AL-WAGDANI	MOHAMMAD	DAKHEELALLA
AMOYAL	LESLIE	CHABOT
AQUILINA	ISABELLA	
ASHUTE	FREDERICK	ANTHONY
AUDIA	ARTHUR	J
AUERBACH	JOSHUA	
AZECHI	KIMIKO	
AZECHI	SHUHEI	
BAILEY	DONALD	ATHOLL
BALTENSPERGER	MARC	MICHAEL
BANDINI	JEAN-CHRISTOPHE	DENIS
BARBER	BRYAN	
BARBER	SHARON	
BASU	MONAMI	
BAUTZ	FRIEDLINDE	ANNA MARIA
BEAZLEY	JEFFREY	C
BEHN	CHRISTOPH	
BEKTAS	SERKAN	
BENNETT	CYNTHIA	
BERLEPSCH-VALENDAS	OLIVER	CHRISTIAN
BERLIAND	MIRNDA	LOUISE
BERNIER	JOCELYNE	
BERTHOLD	DOROTHY	ISABELLE
BESSMERT	DANIEL	
BIASUCCI	JOHN	W
BJERTNES	MARK	ERIK
BLACK	CRAIG	GRANT
BODMER	PATRIC	DIEGO
BOEHLEN	ANDRE	F
BOEHLEN	MYRIAM	C
BOISSIER	CLAUDIA	ANN
BOISVERT	ANDRE	
BONGIORNO	MICHELLE	PIETRO FILIPPO
BONGIORNO	NICOLO	
BORG-WIKLUND	EVA	
BOVET	CLAUDE	HENRI
BRACHET	ALEXIS	
BRADLEY, JR	RUSS	VAN VIECK
BRATSBERG	STIAN	MIKAEL
BREUER	PETER	
BRIONES	BRENDA	C
BRODTBECK	ANDREAS	DANIEL
BRODTBECK	PETER	LAWRENCE
BROST	HANNAH	HEERA
BROWN	DAVID	A
BRUNNSCHWEILER	CHRISTA	NOEL
BRUTON	KRISTIN	MARIE
BUCKINGHAM	RICHARD	G
BURDEN	BRIAN	
BURDEN	DEBORAH	E
CADY ROUSTAND DE NAVACELLE	GILLES	HENRY
CAMPBELL	GARY	E
CAMPOS	MONICA	
CARBONE	CHRISTOPHER	ALLEN
CAREY	ROBIN	JOY
CARNEY	MATTHEW	ISAAC
CATTAUI	MICHAEL	
CHAMMAS	RICHARD	E
CHAN	LEE-MING	

Last name	First name	Middle name/initials
CHAN	STEFFI	KANG TING
CHAN	STEVEN	CHEE-JIN
CHAN	VINCE	CHI YAN
CHANG	CATHERINE	HSIAO
CHANTAL OF GREECE	MARIE	
CHAO	KO	CHENG
CHAPPELL	MARY	ELLEN
CHARLES	MARIE	
CHARTRAND	MARC	LEO
CHEN	ELIZABETH	
CHEN	IRENE	
CHEUNG	FUNG	Y
CHEUNG	NERISSA	SUI MAN
CHIEN	PETER	
CHIU	HSIU CHIN C	CHIN C
CHIU	WEN-TA	
CHOW	KYAN	MERVYN
CHOW	SELWYN	S
CHRISTESON	TONYA	
CHU	FRANKLIN	DEAN YUAN
CHU	SHAO-HUA	
COBURN	RICHARD	GAGE
COLLIER	NICHOLAS	JOHN
COLLIER	NICHOLAS	JOHAN
COMMUNAL	HENRI	
CORNELY	URSULA	
COX	GABRIEL	
CRESSMAN	SUSAN	ELIZABETH
CRITTENDEN	FRANCES	JANE
CRUIKSHANK	SUSAN	SHATTO
DAHAN	ELISABETH	DE PATER
DAHAN	RENEE	
DAIGLE	A	YVONNE
DAUM	PATRICIA	
DAVIDSON	JUTTA	
DE LA HUNTY	ANITA	LOUISE
de MESTRAL	DARCY	AYMON
DE MUSKA	FREDERIQUE	
DE MUSKA	JEAN-PHILIPPE	
DE MUSKA	MICHEL	
DE PAREDES	CARLOS	GARCIA
DE SOCORRO-VALLEJO	ANGELA	MARIE
DELEEDE	ANTHONY	G
DESAI	ANAND	R
DESPERT	ALAIN	FERNAND
DIEMER	INGRID	H
DINGER JR	CARL	GENE
DIPUMA	FRANK	J
DISKO	STEFAN	C
DOMINGO	TATIANA	SANTO
DONG	JING	
DONOHOE	JAMES	JPSEPH
DONOHUE	DAVID	LEE
DONOHUE	MAGDALENA	
DURISCH	THOMAS	BASTIAN
EICHENBERGER	ANDRE	CHRISTIAN
EISENBEISS	LIESL	MARIA PATRICIA
ENGELMAN	MATTHEW	JOEL
ERNANNY	JULIA	SOUZADE PAIVA
EWERT	KENNETH	J
EWERT	MONICA	R
FAIRBURN	KARIN	U
FAUDE	SCOTT	RUDI SVENN
FELLRATH	GEORGE	MICHAEL
FERMEAUX	VALERIE	JEANNE
FIGUERES	MUNI	
FILOTTI	MARIE	D
FINKBEINER	HORST	E
FLAMANT	NICOLAS	C
FOLKOFF	JACOB	BENJAMIN
FONG	MAGGIE	YUEN CHI
FOOT	GISELA	
FOOT	GRAHAM	R
FRANGI	ANWAR	T

Last name	First name	Middle name/initials
FRASER	GRANT	ERNEST
FREEMAN	JOHN	KENTON
FRESI	BRADLEY	D
FU	EM-ON	
FU	KA	CHUN
FU	SAI	PIU
FUJIKAWA	KIYOMI	
FUJIKAWA	SADAYUKI	
FUNG	EUGENE	YUI-HANG
FUSHMAN	YAEL	
GALLOTTI	DANIALA	
GARCIA	MARIO	
GELSI	MARIO	
GEORGE	JEFFREY	JULIAN
GERSBACH	MAREK	ARNAUD
GERTH	DALE	BERNARD
GILMARTIN	DENISE	NG
GITLIN	DONALD	ISAAC
GOBETS	BAMIYAN	A
GOLDLUST	ALAN	
GOLLIN	SUSANNE	NINA
GOUGH	GEOFFREY	R
GRAHAM	BARRY	M
GRAHAM	KAY	
GRANDY	JOANNE	COLLINS
GROSSMAN	JONATHON	SANDOR
GUGA	RICHARD	
GUNJI	HIROMI	
GUPTA	RAHUL	
GUPTA	SUJATA	
GUTTA	SRINIVAS	V
HABERMANN	MONICA	ISABEL
HAFFNER	MAJA	HELEN
HALL	ANTHONY	JOHN
HALL	NICHOLAS	J
HAMBLIN	DAVID	STANLEY
HAMBLIN	PAULINE	
HAMILTON	REID	HEURTLEY
HANIBAL	AMAR	T
HARTE	NEIL	D
HARTWICH-KNIGHT	KAREN	
HASKELL	PRESTON	HAMPTON
HASTRY	JOHN	JOSEPH PATRICK
HEDDINGER	GERALD	JOHN
HEIDLBERG	MICHELLE	HEDWIG
HEINEN	FRANZ	JOSEF
HELM-EISELT	RENATE	
HEMSWORTH	COLIN	
HEMSWORTH	FIONA	
HENTSCH	ALEXIA	VELLOSO FREIRE
HENTSCH	FLAVIA	VELLOSO FREIRE
HERRERA	GUSTAVO	A
HERZ	STEPHEN	OLIVER
HEURTEMATTE	ELIZABETH	LAUREN
HEURTEMATTE	VICTORIA	ALEXANDRA
HIGASHIYAMA	ATSUSHI	
HIGASHIYAMA	HISASHI	
HIGASHIYAMA	YURI	
HILE	ROBERT	IRWIN
HNUG	LING	YU
HOFMAN	EUGENE	R
HOFMAN	EUGENE	JOHN
HONG	TAYLER	JIHYE
HOU	KAI	YUP
HOWLETT	LYNN	
HOYES	STEPHEN	
HSU	CHIN	CHI
HSU	MING	YU
HSU	TSUI	CHING
HUANG	KUO-WEI	
HUI	KAM	KWEI
HUTCHINSON	MARY	JEANNE
HWANG	CHOHEE	
IANEV	CHRISTO	SLAVTCHEV

Last name	First name	Middle name/initials
ILLINGWORTH	STEPHEN	ALAN
INGRAM	JOAN	BAILEY
INGWERSEN	KIMBERLY	ANNE
IP	SAI	YIN
IRANZO	MANUEL	
ITO	NORIKAZU	
IUE	MOTOHARU	
IVSAN	INGA	
JIMENEZ-LARA	ZENAIDO	
JONES, JR	ROBERT	FRANKLIN
JON-PAUL	SEAN	PATRICK
KALGRAF	OLAV	LURAAS
KAUSAR	NASIR	ALESSANDRO
KAWAJIRI	MASARU	
KAWAJIRI	MOTOKO	
KAWAKAMI	SHUHEI	
KAWAKAMI	YURIE	
KELLER	SUSAN	E
KENNEDY	NEIL	
KHOURY	ISSAM	N
KIM	IN	SOOK
KINGSBURY	KARLA	JOHANNA
KIRKMAN	LYNDA	DOROTHY
KITAJIMA	TOSHIKO	
KLEINER	ANDREA	BARBARA
KLEINER	MIRIAM	TAMARA
KMIEC	ANDREW	FRANK
KNYNENBURG	DONALD	A
KOEHLER	KLAUS	
KOEHLER	MARLIES	
KORTSCHAK	GERMAN	FELIX
KRAETZ	MELVIS	MARIA
KREPP	KERSTI	MAY
KRIENKE	BJORN	
KUSTER	PHILIPPE	ALLAN
KWAN	MEI	L
LAI	CHRISTINA	FOO SHEUNG MA
LAI	ZHUOYUAN	
LAM	ALFRED	NGO-HNG
LAMARRE	ROBERT	
LAMBERT	FABIEN	THOMAS
LAMPRECHT	LINDA	
LANCKSWEERT	THIBAULT	PHILIPPE
LAU	JENY	
LE CALVEZ	DIDIER	
LEDVINA	MATTHEW	CONWAY
LEE	CHUTIMA	
LEE	CYNTHIA	ANNE HONG-YEE
LEE	JASON	HAWKIN
LEE-HSU	MONA	SHUET MI
LEHMAN	GAIL	A
LEONG	JIA	JUN
LEUNG	ALEX	
LEUNG	ANDRE	WAI KIM
LEUNG	DANSON	
LEUNG	PUI	YIN
LEUNG	TAT	YAN
LEVETT	GINA	ANNA MARIA
LI	GUOJI	
LI	MICHAEL	MAN TOA
LIANG	GUANG	YU
LIHOU	ELISABETH	ANN
LIM	YOUN-KYUNG	
LIN	SAMUEL	PERNG-LIANG
LINDO	GLADYS	LORENA
LITVAK	IGOR	M
LIU	CHARLIE	CHI-YUNG
LO	CHUNG KEE	THOMAS
LOCK	ANDREW	J
LOCK	SARAH	H
LOH	LEAN	K
LOSADA	RODRIGO	
LOW	BLIGH	KEE WAI
LOWTHER	CAMILLA	ANN

Last name	First name	Middle name/initials
LU	CHIA	AO WILLIAM
LUI	EILEEN	WAI LING
LUI	PETER	NING SHUN
LUKENDA	MICHAEL	
LUMMIS	JOHN	MAXWELL
LUND	TAMARA	DEIDRE
MA	CHUN	KEUNG
MA	ERIC	
MALICK	FRANK	N
MALLET	LORELEE	SUSAN
MAN	AMIR	ABRAHAM
MANSBRIDGE	ANNE	
MARKS	JANE	KATHRYN
MARRIN	JANE	CECILIA MINET
MARTI	MANUEL	
MARWAH	PHYLLIS	ANN
MASON	REVECCA	JANE
MASUDA	HISAKO	
MASUDA	NOBORU	
MATSUMOTO	TAKASHI	
MATSUYAMA	SHIGEO	
MATTHEW PATON	CHARLES	ROBERT
MAUPIN	DARREN	JOHN
MC CALLUM	GARY	J
MC VEIGH	JENNIFER	BRANSFORD
MCGEE	KEVIN	
MCPHERSON	PEGGY	KIRK
MEEK	FRANK	MARTIN
MEI	HSIAO-TING	
MERSZEI	GEOFFERY	E
MILEY	AGNES	
MILLER-GETTY	PIA	CHRISTINA
MISAWA	NORIKO	
MITCHELL	MATILDA	
MOONEY	RANDY	JEAN
MORIN	GERALD	
MOSS	PAMELA	JANE
MOTA	SAMUEL	
MUI	MALCOLM	HIN
MURBACH	ALEXANDER	MARTIN
MURPHY	DARLENE	WILMA
MURTHY	SREENATH	N
NAHUM	CLAUDE	
NEUMAN	YVONNE	T. H.
NG	KAR	FAI JEFFREY
NG	VICTORIA	H
NICHOLL	COLIN	RICHARD
NIEDERHAEUSERN-WHITEHEAD	MARLENE	VON
NIELD	LOUISE	ALISON
NIEM	JOHN	WIN FONG
NO	JUNG	SOON
NOMURA	TAKEHARU	
NOMURA	YOSHIE	
NOMURA	YUKIKO	
NOON	CHRISTOPHER	
NOON	MARY	
NOYES	KEITH	S
OHASHI	YUKA	
OKABE	TOMOYUKI	
OKAMOTO	MICHIKO	
OKAMOTO	NORIAKI	
OLENICK	NICHOLAS	
ONIKI	MOTOHIRO	
ORII	KEIKO	
ORII	MASAHARU	
OVEREEM	GABRIELLA	
OVEREEM	HELENA	C
OVEREEM	PAULUS	C
OVEREEM	TIM	
OWENS	NANCY	PATRICIA
OZAYDIN	MELIH	
PAN	GUO	PING
PAREKH	AJAY	
PARK	JI	SOOK

Last name	First name	Middle name/initials
PATRY	ROBERT	JOSEPH ALLEN
PAVLOWSKI	DANNY	
PEACOCK	ESTHER	CHRISTINE LEHAR
PECOT III	CHARLES	MATTHEW
PENMAN	JOHN	ROLAND
PERONE	FRANCO	
PERSSON	ALICE	
PERSSON	CHRISTER	
PETERSEN	JORGEN	
PETERSEN	TOVE	
PETTIGREW	PATRICIA	A
PFISTER	ISAAK	KLEIN
PHOENIX	CARSON	I
PHOENIX	MARGOT	A
PIPES	JON	ERIC
PLOUGH	ANN	CATHERINE
PORTAS	SCOTT	C
PORTAS	SHELLEY	A
PRADO	ANDREA	AMARAL DE ALMEIDA
PRATT	ALAN	JOSEPH
PRATT	LORRAINE	
PROBST	MARTIN	RAYMOND
QUINN	ANNA	M
RAWE	ALEXANDRA	SOPHIA MILLINGTON
REIDENBACH	NICOLE	
REINER	MARK	
REINHART	SCOTT	PAUL
RIES	RAY	VOLKER
RITCHEY	CANDICE	
RITTER	NICOLE	A
RITZENTHALER	KRISTIN	
RIZZI	FABIO	
ROBB	IAN	
ROSENZWEIG	JEFFREY	ALLAN
ROSSMAN	PATRICIA	L
RUBINOWICS	CLAUDE	J
RUEESCH	LAURA	KARIN
RYAN	JEFFREY	PRESTON
RYAN	TIMOTHY	PATRICK
SACCANI	RICO	ROBERT
SACCANI	SIGRUN	
SAMMARTINO	DANIEL	R
SCHMID	JOEL	
SCHOENBERG	MARCHIA	GWEN
SCHROEDER	EVELYN	M
SCHUBER	GREGORY	
SCHUBER	KRISTELL	
SCHULTE	PAUL	LOUIS PETER
SCHULZ	FRITZ	ALEXANDER
SCIMONE RIZZI	MARIA	G
SEKULA	FRANK	JOSEPH
SELLERS	MARIELIS	
SEOW	MICHAEL	FU-SHEN
SETO	DAVID	DAWEII
SHAVER	ALLAN	
SHAVER	SHIRLEY	
SHAW	ALEXANDRA	
SHAW	RAY-YANG	
SHI	XIAOBING	
SHIZUKA	KOJIRO	
SIEGRIST	HERTA	A
SILUCH	SUSAN	
SIMONS	AUGUST	EVARISTO
SINGAPURI	JOYDEEP	
SINGH	INDER	
SINHA	BAPPADITYA	
SINO	LEE	CHEI
SIRLUCK	KATHERINE	ANN
SIU	MAN-KAM	
SPENCER	JULIE	
SPENCER	SIMON	
SPITZNAS	ELISABETH	MARIE BEATRICE
STACEY	THOMAS	EDWARD
STEEL	SHEILA	ALWYN

Last name	First name	Middle name/initials
STRUBEL	JOSEPH	GEORGE
SUDO	HIDEO	
SUGIYAMA	EMIKO	
SUGIYAMA	TAKUYA	
SUGIYAMA	YOSHIAKI	
SUM	CHI-EN	GRACE
SUNG SIU	GLADYS	CHI-WHA
SUTPHIN	TRACY	CHRISTINE
SUWA	NORIKO	
SYLVESTER	MIO	PAUL
SZARVAS	SUSANNE	A
TADAHARU	UCHIDA	
TAKEUCHI	EIKO	
TAKEUCHI	YOSHIFUMI	
TAKI	KENTARO	
TAKIGAWA	MASAMICHI	
TAM	HERBERT	
TAMESUE	KEIKO	
TAMESUE	NOBUKI	
TANG	SUE	MAR
TANG	XIN-ZI	
TAYLOR	BRIAN	
TAYLOR	SALLY	MARGARET
TELSON	NATASHA	HANN
THE	SU	MEI
THOMPSON	MARION	ADLER
THOMPSON	SEAN	W
THOMSON	WILLIAM	REID
TIESINGA	PAUL	H
TIMASHEV	RATMIR	V
TORDION	DOMINQUE	M
TORELLI	DIEGO	F
TOSO	KRISTIN	
TRACEY	JACQUELINE	WING YING
TSEUNG	DANIEL	KAR-KEUNG
TSUI	SIU-MI	MARIA
TUFEANU	GHEORGHE	
TYRRELL	THOMAS	R
VAN DEN BOL	EMILE	
VAN DER WESTHUIZEN	AMANDA	
VAN DER WESTHUIZEN	DAVID	
VAN HARREN	MARIUS	WILLEM
WAGNER-LAGIER	CAROL	A
WALLACE	ELLEN	GENEVIEVE
WALLENTIN	WING-YEN	
WALTER	DOUGLAS	ALLEN
WANG	QIANG	
WANG	WEIPING	
WANG	YEUNG	BILLY
WEISS	OSKAR	ALBERT
WEN	XIAOQING	
WETRHUS	ALLAN	
WHITE	ANITA	
WHITE	WILLARD	W
WHITEHEAD	FRANCES	
WHITTAKER	CATHERINE	ANN
WIDMANN	JASMIN	SONJA
WIKLUND	ANDERS	P
WILSON	MURRAY	J
WOLFER	ANDREA	VERENA
WONG	CONNIE	Y C
WONG	KIN	YIN
WONG	YUEN	KENG
WONG, JR	WILLIAM	
WOO	DARRIN	
WOO	NANCY	CHU
WOO AKA WING FAI NG	JAMES	WING FAI
WOOD	ALLEN	MICHAEL
WOOD	JOYCE	MARY
WORCESTER	ROBERT	MILTON
WU	ENOCH	YI-NONG
WU	FRANCES	
YAO	ANDREW	E
YEUNG	CHARMAGNE	

Last name	First name	Middle name/initials
YEUNG	JUDY	MANH Y.
YEUNG	NORMAN LEE	YUEN
YNGVASON	HAFTHOR	
YOSHIIE	MAMIKO	
YOSHINO	TEIJIRO	
YOSHITOMI	MARI	
YU	GREGORY	HOCK-KEN
ZAGE III	GEORGE	RAYMOND
ZEIN	HYAM	
ZEIN	SOLAIMAN	M
ZHANG	TONG	
ZVERINTSEV	ALEXANDER	

Dated: July 20, 2011.

Ann Gaudelli,

Manager Team 103, Examinations Operations—Philadelphia Compliance Services.

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6 CFR Part 31

Ammonium Nitrate Security Program; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 31

[Docket ID 2008–0076]

RIN 1601–AA52

Ammonium Nitrate Security Program

AGENCY: National Protection and Programs Directorate, DHS

ACTION: Proposed rule; request for comments.

SUMMARY: This proposed rule would implement anti-terrorism measures to better secure the homeland. The Department of Homeland Security would regulate the sale and transfer of ammonium nitrate pursuant to section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act with the purpose of preventing the use of ammonium nitrate in an act of terrorism. This proposed rule seeks comment on both proposed text for such a regulation and on several practical and legal issues integral to the development of an Ammonium Nitrate Security Program.

DATES: Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before December 1, 2011 or reach the Docket Management Facility by that date. Comments sent to DHS or the Office of Management and Budget (OMB) on collection of information must reach DHS or OMB on or before October 3, 2011.

ADDRESSES: You may submit comments, identified by docket number 2008–0076, by one of the following methods:

- *Federal eRulemaking Portal:* Follow the instructions at *http://www.regulations.gov* for submitting comments.
- *Mail:* U.S. Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Security Compliance Division (NPPD/ISCD), 245 Murray Lane, SW., Mail Stop 0610, Arlington, VA 20598–0610.

To avoid duplication, please use only one of these methods. For instructions on submitting comments, see the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section below.

Collection of Information Comments: If you have comments on the collection of information discussed in section IV.F (''Paperwork Reduction Act'') of this Notice of Proposed Rulemaking (NPRM), you may submit comments to the DHS as indicated above, and you may also send comments to the Office of Information and Regulatory Affairs (OIRA), OMB. Comments on the collection of information must reach DHS or OIRA on or before October 3, 2011. To ensure that your comments to OIRA are received on time, the preferred methods are by e-mail to *oira_submission@omb.eop.gov* (include the docket number and ''Attention: Desk Officer for Department of Homeland Security/NPPD'' in the subject line of the e-mail) or fax at 202–395–6566. An alternate, though slower, method is by U.S. mail to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for Department of Homeland Security/NPPD.

FOR FURTHER INFORMATION CONTACT: Ammonium Nitrate Security Program Manager, U.S. Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Security Compliance Division (NPPD/ISCD), 245 Murray Lane, SW., Mail Stop 0610, Arlington, VA 20598–0610, telephone number (703) 235–5263.

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Abbreviations and Terms Used in This Document

AN Ammonium Nitrate
ANFO Ammonium Nitrate/Fuel Oil
ANPRM Advance Notice of Proposed Rulemaking
ATF Bureau of Alcohol, Tobacco, Firearms, and Explosives
ATSA Aviation and Transportation Security Act
CFATS Chemical Facility Anti-Terrorism Standards
CFR Code of Federal Regulations
COI Chemical of Interest
CVI Chemical-terrorism Vulnerability Information
DHS Department of Homeland Security
DOT Department of Transportation
EAR Export Administration Regulations
FBI Federal Bureau of Investigation
FR **Federal Register**
HMR Hazardous Materials Regulations
HMT Hazardous Materials Table
IED Improvised Explosive Device
IRFA Initial Regulatory Flexibility Analysis
MTSA Maritime Transportation Security Act
NAICS North American Industrial Classification System
NPRM Notice of Proposed Rulemaking
PCII Protected Critical Infrastructure Information
PHMSA Pipeline and Hazardous Materials Safety Administration
POC Point of Contact
QATT Qualified Anti-Terrorism Technology
RFA Regulatory Flexibility Act
SAFETY Support Anti-Terrorism By Fostering Effective Technologies
SBA Small Business Administration
SORN System of Records Notice
SSI Sensitive Security Information
TSA Transportation Security Administration
TSDB Terrorist Screening Database
TWIC Transportation Worker Identification Credential
UMRA Unfunded Mandates Reform Act
USC United States Code
USCG United States Coast Guard
USDA United States Department of Agriculture
VSL Value per Statistical Life

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this NPRM. The Department of Homeland Security (DHS or the Department) also invites comments that relate to the economic, environmental, or federalism effects that may result from this NPRM. Comments that will provide the most assistance to the Department in developing this proposed rule will refer to a specific provision of the NPRM or the Secure Handling of Ammonium Nitrate provisions in the Homeland Security Act, as amended, explain the reason for any comments, and include other information or authority that supports such comments.

Submission of Sensitive Information: Do not submit comments that include trade secrets, confidential commercial or financial information, Chemical-terrorism Vulnerability Information (CVI), Protected Critical Infrastructure Information (PCII), or Sensitive Security Information (SSI) to the public regulatory docket. Please submit such comments separately from other comments on the proposed rule. Comments containing this type of information should be appropriately marked as containing such information and submitted by mail to the following address: U.S. Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Security Compliance Division (NPPD/ISCD), 245 Murray Lane, SW., Mail Stop 0610, Arlington, VA 20598–0610.

Upon receipt of such comments, DHS will not place the comments in the public docket and will handle them in accordance with applicable safeguards and restrictions on access. DHS will hold them in a separate file to which the public does not have access, and place a note in the public docket that DHS has received such materials from the commenter. If DHS receives a request to examine or copy this information, DHS will treat it as any other request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Department's FOIA regulation found in Part 5 of Title 6 of the Code of Federal Regulations (CFR).

Instructions: All submissions must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

II. Background: Overview of Subtitle J and Associated Regulatory Development Activities

A. Subtitle J

Section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act amends the Homeland Security Act of 2002 and directs DHS to ''regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility * * * to prevent the misappropriation or use of ammonium nitrate in an act of terrorism.'' *See* Public Law 110–161, Division E (2007). Section 563 amends the Homeland Security Act of 2002 (6 U.S.C. 361 *et seq.*) by adding in a new Subtitle J—Secure Handling of Ammonium Nitrate, sections 899A–899J (to be codified from 6 U.S.C. 488 to 6 U.S.C. 488i). All references to 6 U.S.C. 488–488i throughout this document refer to the corresponding sections in the Homeland Security Act of 2002, as amended by section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act. All references to ''Subtitle J'' throughout this document refer to Subtitle J of the Homeland Security Act of 2002, as created by the Fiscal Year 2008 Department of Homeland Security Appropriations Act.

Pursuant to Subtitle J, the Department must develop regulations that require, at a minimum, the following activities:

- *Registration Applications:* Certain ammonium nitrate sellers and prospective ammonium nitrate purchasers must apply for ammonium nitrate (AN) registration numbers from DHS in order to sell, transfer, and/or purchase ammonium nitrate. *See* 6 U.S.C. 488a(c) and 6 U.S.C. 488a(d).
- *Terrorist Screening Database Checks:* The Department must use identifying information of each prospective applicant to conduct a check against identifying information that appears in the Terrorist Screening Database (TSDB). *See* 6 U.S.C. 488a(i)(2)(A).
- *Registration Numbers:* The Department generally must issue an ammonium nitrate registration number or deny the registration of an applicant within 72 hours of receipt of each ammonium nitrate seller's or ammonium nitrate purchaser's complete registration application. *See* 6 U.S.C. 488a(i)(3)(A).
- *Purchaser Verification Activities:* At the point of sale, ammonium nitrate sellers must verify each potential ammonium nitrate purchaser's identity and registration to purchase ammonium nitrate pursuant to procedures

established by the Department. *See* 6 U.S.C. 488a(e)(2)(D).

• *Recordkeeping:* All ammonium nitrate facilities must keep records of sales or transfers of ammonium nitrate for at least two years after each transaction. *See* 6 U.S.C. 488a(e)(1) and 6 U.S.C. 488a(e)(2).

• *Reporting Theft or Loss of Ammonium Nitrate:* Certain ammonium nitrate sellers must report the theft or loss of ammonium nitrate to Federal authorities within one calendar day of discovery of theft or loss. *See* 6 U.S.C. 488d.

• *Inspections and Audits:* The Department must conduct or oversee regulatory compliance inspections and audits of ammonium nitrate facilities' records, monitor compliance with the requirements of Subtitle J, and deter or prevent misappropriation of ammonium nitrate for use in terrorist acts. *See* 6 U.S.C. 488b.

• *Guidance Materials and Posters:* The Department must develop guidance materials that set forth procedures for appealing denial of an application for an ammonium nitrate registration number, guidance materials that help ammonium nitrate facilities identify suspicious ammonium nitrate purchases or attempted purchases or transfers, and posters providing information on sellers' record-keeping responsibilities and on the penalties for violating requirements under the Department's ammonium nitrate program. *See* 6 U.S.C. 488a(i)(4)(c) and 6 U.S.C. 488c(c).

• *Establishing Threshold Percentage of Ammonium Nitrate in a Mixture:* The Department must establish a threshold percentage of ammonium nitrate in a mixture for that mixture to be regulated under the Department's ammonium nitrate program. *See* 6 U.S.C. 488a(b).

• *Appeals and Penalties:* The Department must establish an expedited appeals process for applicants denied ammonium nitrate registration numbers, as well as an appeals process for individuals assessed civil penalties for violating the rules promulgated under Subtitle J. *See* 6 U.S.C. 488a(i)(4) and 6 U.S.C. 488e(d).

B. October 2008 Report to Congress

In an Explanatory Statement accompanying section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act the Chairman of the House Committee on Appropriations indicated a desire for the Department's National Protection and Programs Directorate to ''provide a plan to implement [Subtitle J], including analysis of the resources required to do so, and a proposal for reallocating funding within the National Protection and Programs Directorate for doing so.'' *See* Explanatory Statement Submitted by Mr. Obey, Chairman of the House Committee on Appropriations, Regarding the Consolidated Appropriations Amendment of the House of Representatives to the Senate Amendment to H.R. 2764, 153 Cong. Rec. H15741, H16092 (2007), available at *http://www.gpo.gov/fdsys/pkg/CREC-2007-12-17/pdf/CREC-2007-12-17-bk2.pdf.* In October 2008, the Department submitted to Congress a report in response to this Explanatory Statement, outlining possible approaches to implementing Subtitle J and the potential costs associated with each approach. The Department's report to Congress has aided in evaluating many of the approaches contained in this NPRM. The Department's report can be found in the docket for this NPRM, which is available at *http://www.regulations.gov.*

C. Advance Notice of Proposed Rulemaking

DHS published an Advance Notice of Proposed Rulemaking (ANPRM) titled ''Secure Handling of Ammonium Nitrate Program'' on October 29, 2008. *See* 73 FR 64280. The ANPRM solicited public comment on the following specific issues:

• Comments regarding submission of registration applications (*e.g.,* whether applications should be submitted electronically or in paper form; whether applications should be available only through DHS or through Local Cooperative Extension offices or at United States Post Offices);

• Comments regarding the technical capabilities (*e.g.,* access to computers; access to the Internet; average level of computing skills; frequency of use of integrated Information Technology systems) of ammonium nitrate manufacturers, distributors, sellers, and end-users;

• Comments regarding DHS distribution of ammonium nitrate registration letters or certificates (*e.g.,* whether DHS should use e-mail or regular mail);

• Comments regarding a verification process for registrations and ammonium nitrate purchases, including methods for verifying the identity of any ammonium nitrate purchaser, as well as the identity of designated agents purchasing ammonium nitrate on behalf of registered ammonium nitrate purchasers;

• Comments on the detonability of ammonium nitrate at certain concentrations, including research being conducted concerning the detonability of ammonium nitrate;

• Comments on how likely ammonium nitrate fertilizer users would be to use an alternative fertilizer that is potentially less detonable, such as Sulf-N® 26 Fertilizer Process and Product (ammonium sulfate nitrate fertilizer) which DHS recently Designated as a Qualified Anti-Terrorism Technology (QATT) pursuant to 6 U.S.C. 441–444 (the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, or SAFETY Act). *See http://www.safetyact.gov*;

• Comments on how best to conduct or oversee regulatory compliance inspections and audits of ammonium nitrate facilities' records to ensure that regulated ammonium nitrate facilities are properly maintaining records, to monitor compliance with the requirements of Subtitle J, and to deter or prevent misappropriation of ammonium nitrate for use in terrorist acts;

• Comments on the economic impacts (both long-term and short-term, quantifiable and qualitative) of the implementation of Subtitle J, including potential impacts on State, local, and tribal governments of the United States; potential impacts on agri-business, including ammonium nitrate manufacturers, importers, packagers, distributors, retailers, and end-users including farmers (*e.g.,* whether current ammonium nitrate purchasers would likely reduce their ammonium nitrate purchases as a result of a new regulatory regime); and potential impacts on small businesses;

• Comments on the monetary and other costs anticipated to be incurred by U.S. citizens and others as a result of the new compliance requirements, such as the costs in time and money that an individual may incur to obtain an ammonium nitrate registration number. These costs may or may not be quantifiable and may include actual monetary outlays, transitional costs incurred to obtain alternative documents, and the costs that will be incurred in connection with potential delays at the point of sale;

• Comments on a possible fee structure to address some or all of the costs of this new program, such as registration, TSDB checks, and issuance of ammonium nitrate registration numbers;

• Comments on the benefits of this rulemaking;

• Comments on any alternative methods of complying with Subtitle J; and

• Comments on the best methods or processes for interacting with state and local governments regarding ammonium nitrate security.

See 73 FR 64280, 64281, section IV—Questions for Commenters.

DHS received comments from 33 organizations and individuals. The majority of the submissions, 20, were from private companies and trade associations, including associations affiliated with the farming, explosives, and mining industries. Three universities provided comments, as did three government agencies. Six individuals, including one farmer, also submitted comments.

The topics addressed by the commenters covered a wide range of issues. The two issues that received the most attention were the registration process and the feasibility of using substances other than ammonium nitrate in agricultural operations. DHS received 15 comments concerning the registration process; all 15 commenters wanted the registration process to be as simple and straightforward as possible. Some commenters stated that if a registration process were to be implemented, then a registrant should receive his/her approval from DHS within 72 hours. The commenters expressed differing views on the technological capabilities of the regulated community. Some argued that computer use was sufficiently common for the entire process to be automated through an Internet-based portal. As articulated by these comments, an online process would be fast, inexpensive, and could be structured to allow individuals to apply from their homes or places of business. Others argued that computers are not common enough among ammonium nitrate users, who would either be forced to travel to different locations to register or to invest in computers. This second group of commenters believed that registration through an Internet-based portal would constitute an unjustified burden.

Many commenters believed that regulating ammonium nitrate and not other types of fertilizer will cause a decrease in ammonium nitrate usage because of an expected rise in its cost. There was no agreement on the degree to which the cost of ammonium nitrate use would change, but multiple commenters indicated that cost would be passed along the supply chain until it ultimately reaches end-users. If the cost of ammonium nitrate were to go up, commenters hypothesized that ammonium nitrate alternatives may become preferable. Some comments suggested that continued ammonium nitrate use is based on historical ammonium nitrate use and that using an alternative would have no noticeable effect on operations. Others argued the opposite, stating that alternative fertilizers would not serve the needs of certain crops equally well. Commenters from certain States where ammonium nitrate is regularly used in agricultural operations indicated that ammonium nitrate is the best choice for nitrogen application for certain crops. Other commenters, however, asserted that viable alternatives exist with respect to the majority of crops for which ammonium nitrate currently is used as a fertilizer.

There was a general consensus among commenters regarding the need to avoid duplication of other Federal licensing, regulatory, and inspection programs. Commenters stated that to be registered under the ammonium nitrate program could be unnecessary for individuals already registered under related regulatory programs covering ammonium nitrate use, such as DHS's Chemical Facility Anti-Terrorism Standards (CFATS), Department of Transportation (DOT) hazardous materials regulations, and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regulations. These commenters noted that ATF's inspection process also could be used for ammonium nitrate inspections under this program to minimize inconvenience to ammonium nitrate users.

A number of commenters indicated that some ammonium nitrate is normally lost as bulk ammonium nitrate moves through the supply chain. Commenters noted, for example, that equipment used for transporting bulk ammonium nitrate, such as hoppers, bins, and railcars are not shift-proof, resulting in incidental spillage of ammonium nitrate prills, which are the small, bead-like pellets of ammonium nitrate typically used in the manufacturing, transportation, and bulk use of ammonium nitrate. Additionally, commenters noted that there is normally loss during movement throughout the supply chain due to melting or solidification of ammonium nitrate prills based on nothing more than ambient temperature and humidity. For instance, commenters noted that in a 90-ton railcar shipment, it is not unusual for these phenomena to result in loss of 200–500 pounds of ammonium nitrate. This may result because ammonium nitrate is hygroscopic in nature (*i.e.,* it readily absorbs moisture). When ammonium nitrate prills come into contact with ambient moisture in the air, the prills may cake or meld together, which can simultaneously increase the overall mass of bulk ammonium nitrate while reducing its overall volume. These properties cause significant difficulty in accounting for ammonium nitrate on a fine scale. Consequently, these commenters stated that DHS should not require ammonium nitrate users to report losses of magnitudes normally encountered during ammonium nitrate use and transport.

Several commenters addressed the threshold quantity or percentage composition of ammonium nitrate triggering regulation under this program. The universities that commented on the ANPRM addressed the use of ammonium nitrate in scientific research, while other commenters addressed the use of ammonium nitrate as a component of cold packs. These commenters stated that the quantities of ammonium nitrate used in scientific research and in cold pack manufacturing are so small that persons conducting scientific research or purchasing and selling cold packs should not be subjected to a rigorous regulatory scheme. Several commenters also recommended that DHS should exempt mixtures containing ammonium nitrate that ATF classified ''explosives.''

In developing this NPRM, DHS carefully considered all public comments submitted in response to the ANPRM. DHS will respond to the issues raised therein when responding to the comments received on this NPRM.

D. Research Efforts and Findings

In support of the effort to develop regulations to implement Subtitle J, the Department has examined and considered research into a variety of topics including the security hazards presented by the use of ammonium nitrate; its detonability; existing Federal and State ammonium nitrate programs; and voluntary security programs. In the course of conducting this research, the Department reviewed numerous materials, including, but not limited to, the following:

- A. Bauer, R.D. Heater & J.H. Paterson, Queen's Univ. Mining Eng'g Dep't, The Sensitivity of Ammonium Nitrate Melts and Solutions to Projectile Impact (1981).
- A. King & A. Bauer, Queen's Univ. Mining Eng'g Dep't, Shock Initiation Characteristics of Ammonium Nitrate (1980).
- R.W. Van Dolah, F.C. Gibson & J.N. Murphy, U.S. Dep't of Interior, Bureau of Mines, Further Studies on Sympathetic Detonation, Report of Investigations 6903 (1966).
- R.W. Van Dolah, F.C. Gibson & J.N. Murphy, U.S. Dep't of Interior, Bureau of Mines, Sympathetic Detonation of Ammonium Nitrate and Ammonium Nitrate-Fuel Oil, Report of Investigations 6746 (1966).

• J.J. Burns, G.S. Scott, G.W. Jones & Bernard Lewis, U.S. Dep't of Interior, Bureau of Mines, Investigations on the Explosibility of Ammonium Nitrate, Report of Investigations 4994 (1953).

Information about these materials can be found in the docket for this NPRM. The Department seeks public comment on whether or not there are additional studies or other research materials the Department should consider in support of the development of the final regulations as well as any copies of such studies or research materials.

1. Security Hazards Presented by Use of Ammonium Nitrate

Ammonium nitrate is a chemical that exists in multiple concentrations and physical forms, and different concentrations and forms have different security implications. In the United States, the principal uses for ammonium nitrate are as a fertilizer or as part of an explosive mixture. Ammonium nitrate can be sensitized (made more sensitive to shocks, and thus easier to detonate) with the addition of organic material. One common example is when fertilizer-grade ammonium nitrate is mixed with fuel oil and creates an explosive mixture known as Ammonium Nitrate/Fuel Oil (ANFO). The fuel oil acts as an energy source. Both ammonium nitrate fertilizers and ANFO have been misused in acts of terrorism to cause catastrophic damage to human health, safety, national security, the economy, and critical infrastructure.

Nationwide, fertilizer-grade ammonium nitrate is commonly used in agricultural operations and the chemical and explosives industries. *See* A. King & A. Bauer, 4. Due to its availability in small-scale packaging (*e.g.,* 50-pound bags), ammonium nitrate is susceptible to theft and misuse in making improvised explosive devices (IEDs).

Over the years, ammonium nitrate has been used as an explosives component in terrorist attacks, both domestically and internationally. The 1995 Murrah Federal Building attack in Oklahoma City claimed the lives of 168 individuals and demonstrated how ammonium nitrate could be misused to perpetrate deadly terrorist attacks. *See* Oklahoma City National Memorial, A Look at the Numbers, *http://www.oklahomacitynationalmemorial.org/secondary.php?section=5&catid=145&id=83* (last visited Aug. 11, 2010). The Provisional Irish Republican Army also used ammonium nitrate as part of its London bombing campaign in the early 1980s. *See* Boyce Rensberger, Ammonium Nitrate Explosives Are Simple, Easily Made, Widely Used in Industry, Wash. Post, Apr. 21, 1995, at A28. More recently, ammonium nitrate was used in the 1998 East African embassy truck bombings, killing hundreds and injuring thousands at the U.S. embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya. *See* Corky Siemaszko, Wtc Chemicals In Kenya Blast (Aug. 14, 1998), *http://www.nydailynews.com/archives/news/1998/08/14/1998–08–14_wtc_chemicals_in_kenya_blast.html* (last visited May 11, 2011). Ammonium nitrate was also used in a November 2003 series of truck bombings in Turkey, killing over 50 individuals and injuring an additional 700 individuals at multiple locations across Istanbul. *See* Lauren Johnston, CBSNews.com, Fertilizer Used in Terror Bombs (Apr. 14, 2004), *http://www.cbsnews.com/stories/2004/04/14/world/main611898.shtml* (last visited Aug. 11, 2010). Additionally, since the events of 9/11, stores of ammonium nitrate have been confiscated during raids on terrorist sites around the world, including raids on sites in Canada (*see* Steve Schippert, Threats Watch, Canada Raid Breaks Cell: 3 Tons of Explosives Found (June 3, 2006), *http://threatswatch.org/inbrief/2006/06/canada-raid-breaks-cell-3-tons/* (last visited Aug. 11, 2010)), England (*see* BBC News, Ammonium Nitrate 'Easy to Find' (Mar. 30, 2004), *http://news.bbc.co.uk/2/hi/uk_news/3582921.stm* (last visited Aug. 11, 2010)), and the Philippines (*see* U.S. Dep't of State, Office of the Coordinator for Counterterrorism, Country Reports on Terrorism 2005, p. 78).

2. Detonability of Ammonium Nitrate

It is understood that under proper conditions pure (unblended) ammonium nitrate is detonable. Making reliable explosives from ammonium nitrate is simplified through the addition of a fuel component with which it can react. In addition, though rare, accidental explosions have occurred during the manufacture, storage, and transport of ammonium nitrate. *See* J.J. Burns, G.S. Scott, G.W. Jones & Bernard Lewis, 1. Despite the explosive hazard presented by ammonium nitrate, however, it has been successfully and safely used for decades as a fertilizer. *See* R.W. Van Dolah, F.C. Gibson & J.N. Murphy; Report of Investigations 6746, 2. There is little scientific consensus about the critical diameter of an explosive required for detonation and the size of the conventional explosive charge (*i.e.,* booster) necessary to detonate unblended ammonium nitrate. These questions about detonability all receive research attention today, and have also received research attention in the past. *See* A. Bauer, R.D. Heater & J.H. Paterson, 1, 5 (1981). Preliminary results of ongoing research suggest that unblended ammonium nitrate can be difficult to detonate with any reliability. To date, terrorists typically have employed combinations of ammonium nitrate and fuel oil when utilizing ammonium nitrate in terrorist attacks.

To better understand the detonability of ammonium nitrate and its use in explosives, the Department reviewed, and considered the results of, a study conducted by Sandia National Laboratory. Due to the detailed nature of its content and findings, however, this study, which is ''For Official Use Only,'' is not available to the public. The Department has also consulted with the Federal Bureau of Investigation's (FBI) Explosives Unit. This consultation helped the Department to understand the detonability of unblended ammonium nitrate, the detonability of ammonium nitrate mixtures, and the role ammonium nitrate plays in IED construction and terror-related activities.

The Department seeks public comment on the detonability of ammonium nitrate.

3. Federal Regulations Addressing Ammonium Nitrate

In developing this proposed rule, DHS reviewed other Federal regulations that cover portions of the ammonium nitrate supply chain or deal with identity verification; a number of these other regulations are discussed below. DHS examined these regulations for potential overlap with the proposed Ammonium Nitrate Security Program. In developing this NPRM, the Department collaborated with many of its Federal security partners in an attempt to harmonize this proposed rule with other regulatory regimes.

a. Chemical Facility Anti-Terrorism Standards

In addition to the authority granted to DHS by Subtitle J, the Department had authority under section 550 of the Homeland Security Appropriations Act of 2007, Pub. L. 109–295, to issue regulations governing the security of high-risk chemical facilities. Under that authority, the Department promulgated an interim final rule titled the Chemical Facility Anti-Terrorism Standards (CFATS), 6 CFR part 27. *See* 72 FR 17688 (April 9, 2007). Under CFATS, the Department regulates the security of high-risk chemical facilities, including high-risk chemical facilities that possess ammonium nitrate.

To help the Department identify high-risk chemical facilities under CFATS,

the Department adopted a list of chemicals of interest (COI) as Appendix A to CFATS. *See* 72 FR 65396 (November 20, 2007). Any chemical facility that possesses any COI at or above the applicable screening threshold quantity specified in Appendix A for that COI must complete and submit to DHS certain consequence-based information via an online tool called the Chemical Security Assessment Tool Top-Screen. Any chemical facility preliminarily determined to be high-risk after DHS review of the chemical facility's Top-Screen must then meet additional security-related requirements under CFATS. Due to the risks ammonium nitrate may pose if either (1) exploded on-site, or (2) stolen or diverted to produce IEDs, ammonium nitrate (in both explosive and specified fertilizer forms) is one of over 300 COI that DHS listed in Appendix A to CFATS. *See* 72 FR 65407–65408, 65410.

Although Subtitle J and CFATS share a goal of preventing terrorism risks associated with ammonium nitrate, the scopes and methods of regulation under Subtitle J and CFATS are very different. The CFATS rule—which addresses hundreds of chemicals in addition to ammonium nitrate—is directed at the security of high-risk chemical facilities. The CFATS rule does not, however, impose any limitations on the sale or transfer of ammonium nitrate. By contrast, Subtitle J does not address the physical security of ammonium nitrate facilities but does impose certain conditions on the sale or transfer of ammonium nitrate (*e.g.,* requiring that ammonium nitrate may only be transferred between registered ammonium nitrate sellers and registered ammonium nitrate purchasers (or purchasers' agents)).

In developing the rule required by Subtitle J, DHS intends to draw on information gained under the CFATS program about ammonium nitrate, and will work to ensure that CFATS and the new Subtitle J program complement each other. For additional discussion of the CFATS program's interaction with the proposed ammonium nitrate rule, see section III.A.1 of this NPRM.

b. U.S. Coast Guard Maritime Security Regulations

The U.S. Coast Guard (USCG) regulates ammonium nitrate under multiple programs. Under the Maritime Transportation Security Act (MTSA), 46 U.S.C. 70101 *et seq.,* USCG has authority to regulate security both aboard maritime vessels and at facilities located in, under, or adjacent to any waters subject to the jurisdiction of the United States. Through its MTSA regulations, USCG regulates the security of vessels transporting ammonium nitrate, as well as the security of certain facilities that store, manufacture, use, or distribute ammonium nitrate. In addition, USCG regulates the transportation of ammonium nitrate, and the loading or unloading of ammonium nitrate from vessels at any waterfront facility. *See* 33 CFR part 126 (regulating the handling of ammonium nitrate at waterfront facilities, and establishing penalties for handling ammonium nitrate without a permit); 46 CFR 148.01–7 (regulating the bulk shipment of ammonium nitrate).

USCG has also designated as a ''Certain Dangerous Cargo'' any ammonium nitrate that is not certain dangerous cargo residue. *See* 33 CFR 160.204. Based on this designation, each vessel carrying ammonium nitrate on bodies of water other than certain portions of inland rivers must submit a Notice of Arrival prior to arrival in port. *See* 33 CFR part 160, subpart C. The Notice of Arrival must contain certain information, including the name of the vessel's owner and operator, the names of the last five ports or places visited, the amount of ammonium nitrate on board, and information pertaining to each crewmember aboard. *See* 33 CFR 160.206. Owners and operators of U.S.-flagged vessels carrying ammonium nitrate in bulk must have, and must operate in compliance with, USCG-approved vessel security plans. *See* 33 CFR 104.410. Likewise, owners and operators of facilities that receive vessels carrying ammonium nitrate in bulk must have and operate in compliance with USCG-approved facility security plans. *See* 33 CFR 105.410.

c. Transportation Security Administration

The Transportation Security Administration (TSA) has broad authority over security of all modes of transportation. These authorities are found primarily in the Aviation and Transportation Security Act of 2001 (ATSA), Public Law 107–71, which regulates the transportation of cargo, including ammonium nitrate. ATSA broadly allows TSA to ''exercise * * * powers, relating to transportation security as [TSA] considers appropriate.'' *See* 49 U.S.C. 114. TSA exercises its authority under ATSA in part by performing threat assessments on truck drivers who must receive Hazardous Materials Endorsements in order to be authorized to transport ammonium nitrate.

d. Bureau of Alcohol, Tobacco, Firearms, and Explosives

ATF, a principal law enforcement agency within the U.S. Department of Justice, is dedicated to preventing terrorism, reducing violent crime, and protecting our nation. Among its authorities, under 27 CFR part 555, ATF is responsible for regulating the use of explosives, which are defined by inclusion in ATF's annual List of Explosive Materials, ATF Publication 5400.8. *See* 75 FR 1085 (Jan. 8, 2010) (notice of annual list). While ATF does not consider ammonium nitrate an explosive, ammonium nitrate explosive mixtures and ANFO are included in ATF's list of explosive materials. ATF regulations require that no person, other than a licensee or permittee, knowingly transport or receive any explosive material (including ANFO). *See* 27 CFR 555.26(a). Section III.A.3 of this NPRM discusses the interaction of ATF regulations with the proposed ammonium nitrate rule.

e. Department of Transportation Hazardous Materials Regulations

The Federal Hazardous Materials Transportation Law (Federal Hazmat Law, 49 U.S.C. 5101 *et seq.*) authorizes the Secretary of Transportation to ''prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.'' The Secretary of Transportation has delegated this authority to Pipeline and Hazardous Materials Safety Administration (PHMSA). PHMSA, through its Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180), prescribes transportation requirements for hazardous materials, including ammonium nitrate.

The Hazardous Materials Table (HMT; 49 CFR 172.101) lists several shipping descriptions for ammonium nitrate and ammonium nitrate mixtures or solutions. These descriptions vary based on the properties of the particular ammonium nitrate at issue. As such, a shipment of ammonium nitrate may be classed and regulated as a Division 1.1D explosive, Division 5.1 oxidizer, or Class 9 miscellaneous hazardous material. For transport in commerce these materials must comply with all applicable HMR requirements (*e.g.,* packaging, shipping papers, marking, labeling, placarding, security plans, emergency response information, training, etc.).

f. Department of Commerce

Under the Export Administration Regulations (EAR), the U.S. Department

of Commerce's Bureau of Industry and Security regulates the export and re-export of ammonium nitrate. A ''re-export'' is the shipment or transmission of an item subject to the EAR from one foreign country (*i.e.,* a country other than the United States) to another foreign country. A re-export also occurs when there is release of technology or software subject to the EAR to a foreign national outside the United States. *See* 15 CFR 734.2, and 15 CFR part 772 (definition of ''re-export'').

Specifically, under the EAR, licensees are authorized to export or re-export ammonium nitrate only to certain countries listed in the EAR, and consistent with the terms of the issued export license. *See* 15 CFR 742.6 and 15 CFR 747.3. Under the EAR, ammonium nitrate is defined to include fertilizers and fertilizer blends containing more than 15% by weight ammonium nitrate, except liquid fertilizers (containing any amount of ammonium nitrate) or dry fertilizers which contain less than 15% by weight ammonium nitrate. *See* 15 CFR part 774, Supplement 1 for item-specific export licensing information. Individuals involved in the domestic sale or transfer of ammonium nitrate, as defined by DHS, at U.S.-based exporters of ammonium nitrate would be required to register with the Department under the proposed Ammonium Nitrate Security Program.

4. State Regulations Addressing Ammonium Nitrate

Virtually all 50 States regulate ammonium nitrate in some manner, based on its use either as a fertilizer, an explosive, or both. Although not in universal agreement, relevant State regulations typically define ammonium nitrate as an ammonium and nitrate mixture containing not less than 33 percent nitrate; require purchasers and sellers of ammonium nitrate to register with a governing State body; and require sellers of ammonium nitrate to maintain records of sales of ammonium nitrate for at least two years. Many State regulations grant State officials both the authority to inspect facilities possessing or distributing ammonium nitrate and the authority to fine or otherwise penalize facilities or individuals who fail to comply with regulations concerning ammonium nitrate.

5. Voluntary Programs Addressing Ammonium Nitrate

In addition to efforts required by existing Federal and State regulations, many producers, distributors, and users of ammonium nitrate have undertaken voluntary efforts to secure the ammonium nitrate supply chain. Chief among these voluntary efforts is the ''America's Security Begins With You'' program. This program is a voluntary ''know-your-customer'' program developed jointly by the ATF and members of the fertilizer industry following the 1995 attack on the Alfred P. Murrah Federal Building in Oklahoma City. The Department believes that, in many instances, voluntary programs already in place can serve as good building blocks for meeting regulatory requirements. The Department seeks comments providing details on voluntary programs related to ammonium nitrate security and how they could potentially be leveraged by ammonium nitrate users to meet the requirements of the proposed rule.

III. Discussion of Proposed Rule: Implementing Subtitle J

What follows is a discussion of the approach DHS is proposing to take in implementing Subtitle J. Where appropriate, potential alternative approaches are also discussed. DHS welcomes public comment on the proposed rule, and also on potential alternative approaches.

The cost to the public of this proposed rule ranges from $300 million to $1.041 billion over 10 years at a 7% discount rate. The primary estimate is the mean which is $671 million. For comparison, at a 3% discount rate, the cost of the proposed rule ranges from $364 million to $1.3 billion with a primary (mean) estimate of $814 million. The average annualized cost for the program ranges from $43 million to $148 million (with a mean of $85 million), also employing a 7% discount rate. The following two tables present the summary discounted total and annualized costs for the rule.

OMB ACCOUNTING STATEMENT OF ANNUALIZED COSTS AND BENEFITS PROGRAM YEARS 1–10)

	3 Percent discount rate			7 Percent discount rate		
	Primary estimate (millions)	Minimum estimate (millions)	Maximum estimate (millions)	Primary estimate (millions)	Minimum estimate (millions)	Maximum estimate (millions)
Costs						
Annualized Monetized Costs	$95.4	$42.7	$148.1	$95.5	$42.7	$148.2
Benefits						
Qualitative (un-quantified) Benefits	Reduced vulnerability to terrorist attack using ammonium nitrate.					

SUMMARY OF COSTS ($ MILLIONS, 7 PERCENT DISCOUNT RATE)—BY PROGRAM YEAR

	Registration	Appeals	Point of sale	Recordkeeping	Audits/ inspections	Federal costs	* Total cost
PY1	18.9	0.1	67.5	6.2	0.4	9.8	102.7
PY2	4.4	0.0	62.6	4.4	0.4	6.5	78.2
PY3	4.3	0.0	58.4	4.1	0.4	6.0	73.2
PY4	4.2	0.0	54.7	3.8	0.4	5.7	68.7
PY5	4.2	0.0	51.1	3.6	0.3	5.3	64.4
PY6	8.9	0.0	48.1	3.4	0.3	5.1	65.8
PY7	6.8	0.0	44.6	3.1	0.3	4.7	59.5
PY8	6.7	0.0	41.7	3.0	0.3	4.4	56.0
PY9	6.6	0.0	39.0	2.8	0.2	4.2	52.6
PY10	6.5	0.0	36.4	2.6	0.2	3.9	49.5
Total	71.3	0.1	503.8	36.8	3.0	55.3	670.6

* Reporting of Thefts rounds to zero in individual years and are omitted from this table but included in the total and regulatory analysis.

DHS also conducted a break-even analysis that examines the required reduction in the potential frequency of terrorist attacks involving ammonium nitrate. The proposed rule would be cost effective if it resulted in a reduction in attack frequency by at least one attack the size of the Oklahoma City bombing (which occurred 16 years ago) per 14 years. For discussion of this analysis, and for explanation of other cost calculations, please see section IV of this NPRM, which discusses various regulatory analyses conducted by DHS.

A. Ammonium Nitrate Subject to Subtitle J Requirements (See Section 31.105 of the Proposed Rule)

This section will address the definition of ammonium nitrate. Congress has defined ammonium nitrate for purposes of *Subtitle J* to include ''solid ammonium nitrate that is chiefly the ammonium salt of nitric acid and contains not less than 33 percent nitrogen by weight.'' *See* 6 U.S.C. 488(1)(A). DHS proposes to use this definition of solid ammonium nitrate in section 31.105 of the proposed rule.

Also included in the definition of ammonium nitrate for purposes of Subtitle J is ''any mixture containing a percentage of ammonium nitrate that is equal to or greater than the percentage determined by [DHS].'' *See* 6 U.S.C. 488(1)(B). In establishing this mixture percentage for purposes of Subtitle J, the Department was required to consult with the heads of appropriate Federal departments and agencies, including the Secretary of Agriculture, and to provide notice and an opportunity for comment. *See* 6 U.S.C. 488a(b). That consultation is discussed below.

This section will also discuss the Department's consideration of a minimum threshold amount of ammonium nitrate that would have to change hands as part of a sale or transfer before that sale or transfer (including the individuals participating in the transaction) would be subject to Subtitle J's requirements. This section will also discuss the Department's discretionary ability to exempt from regulation ''a person producing, selling, or purchasing ammonium nitrate exclusively for use in the production of an explosive under a license or permit issued under chapter 40 of title 18, United States Code.'' *See* 6 U.S.C. 488a(f).

1. Mixture Requirement

Mixtures containing high percentages of ammonium nitrate can be effectively used in bomb-making. By proposing to include a mixture requirement in the Ammonium Nitrate Security Program, the Department is seeking to capture under this rule mixtures that terrorist bomb-makers would be most interested in acquiring. To assist in determining an appropriate threshold percentage of ammonium nitrate in a mixture for purposes of Subtitle J, the Department reviewed multiple detonability studies, examined mixture requirements employed by other Federal and State regulatory programs, and consulted with a variety of Federal, State, and private sector entities. Based on this research and after consultation with the FBI's Explosives Unit, the Department proposes to define ammonium nitrate in section 31.105 to include any mixture that is 30 percent or more ammonium nitrate by weight. By setting the mixture requirement at 30 percent, the Department believes the proposed rule will capture those ammonium nitrate mixtures that could be most effectively used in bomb-making, or that could be most effectively retooled or reconfigured for use in bomb-making.

The Department is aware that this proposed mixture requirement differs from the mixture requirements used for ammonium nitrate under CFATS. Under CFATS, a mixture containing ammonium nitrate is counted towards the screening threshold quantity for ammonium nitrate if ammonium nitrate makes up 33 percent or more of the mixture. Therefore, this proposed mixture requirement for this rule would apply more broadly than the mixture requirement in CFATS; the ammonium nitrate mixtures covered under this proposed requirement would include ammonium nitrate mixtures containing between 30 and 33 percent ammonium nitrate by weight, while CFATS' mixture requirements do not cover mixtures containing between 30 and 33 percent ammonium nitrate by weight.

There are two main reasons for the difference between the CFATS approach to ammonium nitrate mixtures and the proposed Ammonium Nitrate Security Program approach to mixtures. First, the two mixture requirements exist to accomplish different goals. The CFATS mixture requirements exist to help the Department identify potentially high-risk chemical facilities subject to CFATS. The CFATS mixture requirements are not an assertion by the Department that only ammonium nitrate mixtures containing 33 percent or more ammonium nitrate are vulnerable to misuse in acts of terrorism. The proposed Ammonium Nitrate Security Program mixture requirement, however, is solely meant to identify ammonium nitrate mixtures that have the potential to be misused in acts of terrorism. Accordingly, a more conservative and inclusive mixture requirement is appropriate for Subtitle J.

Second, during the development of this proposed rule, the Department obtained information from the Department of Justice, indicating that under certain circumstances, experiments that have shown that mixtures containing as low as 30 percent ammonium nitrate by weight can be used as components of viable explosives. This information was unavailable to DHS when it wrote and published the CFATS mixture requirements. In light of this evidence and the purpose for which the Subtitle J mixture requirement is being established, the Department believes that setting the proposed mixture requirement at 30 percent ammonium nitrate is the correct course of action.

The Department's proposed mixture requirement would exempt persons and entities from coverage under the proposed rule only to the extent that they possess or obtain mixtures containing less than 30 percent ammonium nitrate by weight. The proposed requirement would not exempt persons and entities from coverage to the extent that they possess or obtain solid ammonium nitrate which they intend to incorporate into ammonium nitrate mixtures. The Department thus proposes that the purchase, sale, transfer, or acquisition of solid ammonium nitrate to be incorporated into mixtures will be treated the same as the purchase, sale, transfer, or acquisition of ammonium nitrate not to be incorporated into mixtures.

The Department is interested in receiving comments on this proposed approach, including comments on the Department's proposal to define ammonium nitrate to include any mixture that is 30 percent or more ammonium nitrate by weight. DHS requests comments addressing the appropriateness of this percentage, comments addressing whether it would be more appropriate to express this percentage as a percentage of mixture weight or as a percentage of mixture volume, and comments discussing whether a higher or lower mixture percentage would be more appropriate. The Department is also interested in comments addressing possible consumer and retail impacts of the proposed mixture requirement, and on the detonability of ammonium nitrate and ammonium nitrate mixtures of varying percentages.

2. Threshold Weight and Individual Products Exemptions

The Department's understanding is that, outside of small sample or research quantities, ammonium nitrate is primarily sold either in bulk or in pre-packaged bags containing no less than 50 pounds of ammonium nitrate. Mixtures that contain small percentages or amounts of ammonium nitrate are also found in various retail products, including home and garden products (*e.g.,* fertilizer mixtures) and cold packs.

Under Subtitle J, the Department has authority to regulate transactions (and the individuals conducting them) involving any amount of ammonium nitrate. The Department is proposing to establish a threshold weight to which the regulation would apply, and is considering whether the marginal security benefits gained from regulating transactions involving de minimis quantities of ammonium nitrate are outweighed by the costs of regulating those transactions. Similarly, the Department is considering whether the security benefits gained from regulating transactions involving products packaged such that they are unlikely to be used to make an explosive are outweighed by the costs of regulating those transactions. To avoid capturing these transactions under its regulatory regime, and to avoid complicating ammonium nitrate transactions that may only pose a de minimis security risk, the Department is considering applying both a minimum threshold weight and an individual products exemption for cold packs to this rulemaking.

The Department is considering establishing a threshold weight whereby each transaction would be subject to Subtitle J's regulatory requirements only if the transaction involves the sale, transfer, or purchase of ammonium nitrate that, in the aggregate, is equal to or greater than the threshold weight. Specifically, section 31.105 of the proposed rule contains a 25 pound threshold weight. The Department believes that this weight is low enough to prevent a bad actor from easily acquiring a sufficient quantity of ammonium nitrate to pose a terrorist threat. The Department also believes that this weight is high enough to avoid capturing small laboratory quantities of ammonium nitrate or transactions involving other de minimis quantities of ammonium nitrate that are unlikely to be misappropriated for use in a terrorist act. The Department believes that such de minimis quantities are unlikely to be misappropriated for use in a terrorist act due to the large number of transactions in de minimis quantities that would be required to accumulate sufficient ammonium nitrate to construct an explosive that poses a significant terrorist threat. This threshold should also reduce the economic impact of the Ammonium Nitrate Security Program by avoiding regulation of those transactions that present de minimis security risk.

In order to determine the utility of this approach, the Department solicits comments on the manners in which ammonium nitrate is sold and packaged, the manners and frequencies of use of ammonium nitrate in small quantities, and the utility of setting a threshold weight. The Department additionally requests comments addressing the appropriateness of the proposed 25 pound threshold weight. Specifically, the Department asks whether another threshold weight, such as 5 pounds, 10 pounds, 50 pounds, or another quantity, would better achieve the desired results of the proposed rule.

If the Ammonium Nitrate Security Program does include a threshold weight, DHS proposes that the threshold weight would apply to mixtures as well as to unblended ammonium nitrate. As such, the proposed rule would apply to an ammonium nitrate mixture only if (1) the mixture weighs at least the threshold weight, and (2) the mixture contains at least 30 percent ammonium nitrate by weight. Both conditions would need to be satisfied in order for the proposed rule to apply to a given mixture.

The Department proposes that when applying the threshold weight to an ammonium nitrate mixture, the total weight of the mixture should be counted, as opposed to just the weight of the ammonium nitrate in the mixture. In other words, all ten pounds of a single ten-pound bag (or all ten pounds of ten one-pound bags) of fertilizer mixture containing 30 percent ammonium nitrate by weight would count towards the threshold weight, and not just the three pounds which is the weight of the ammonium nitrate portion of that mixture. The Department believes this approach would be more effective at preventing a bad actor from acquiring sufficient quantities of ammonium nitrate than would an alternative approach under which only the ammonium nitrate content of a mixture is counted towards threshold weight. The Department solicits comments on the utility and manner of application of the proposed threshold weight to mixtures containing ammonium nitrate.

In addition to including a threshold weight in the proposed rule, the Department is proposing to exempt cold packs containing ammonium nitrate from regulation. In section 31.105 of the proposed rule the Department proposes to define a ''cold pack'' as a small, commercially-available package commonly used as a replacement for ice in the application of first aid, containing unmixed water and ammonium nitrate that, immediately prior to use, can be manipulated to cause the comingling of the water and the ammonium nitrate resulting in an endothermic reaction that significantly lowers the temperature of the package. For the following reasons, DHS does not believe that Congress intended the people and facilities buying and selling cold packs to be regulated by Subtitle J.

The Department believes that the security benefits obtained from regulating sales and transfers of cold packs would be minimal and outweighed by significant impact on the general public. Cold packs individually contain extremely small amounts of ammonium nitrate such that collecting very large numbers of them would be necessary in order to obtain enough ammonium nitrate to produce a dangerous explosive device.

The Department also believes that regulating sales and transfers of cold packs would impose substantial economic impacts on the public, which would not be justified by the minimal security benefit gained by cold packs regulation. Specifically, DHS is concerned that regulation of cold packs would have serious and negative impacts on the provision of first aid, first responders, and the medical sector generally. These substantial impacts would be spread over a large variety of retail stores, medical facilities, health care providers, athletic teams, regulated industries that require first aid kits containing cold packs, and individuals using cold packs for personal first aid purposes. A preliminary examination indicates that the potential affected populations could easily exceed six million individuals, businesses, and organizations or public entities. Complicating the issue is the fact that many cold pack manufacturers do not use ammonium nitrate in their products—many manufactures assemble cold packs that contain other chemicals instead of ammonium nitrate. Cold pack purchasers or sellers might not know which chemicals are present in the cold packs they obtain, prior to obtaining them, which could complicate their abilities to comply with any regulatory requirements.

For these reasons, the Department does not believe that Congress intended cold packs—or the sporting goods stores, recreational centers, schools, and other entities that purchase or sell

them—to be covered under Subtitle J. DHS requests comments describing the populations that could be impacted by cold packs regulation, including comments discussing those populations' abilities to comply with the proposed regulatory requirements.

The Department's proposed cold packs exemption would exempt persons and entities from coverage under the rule only to the extent that they purchase, sell, or transfer cold packs containing ammonium nitrate. The proposed rule would not exempt persons and entities (such as manufacturers of cold packs) from coverage to the extent that they purchase or transfer ammonium nitrate which they intend to incorporate into cold packs. The Department thus proposes that the purchase, sale, transfer, or acquisition of ammonium nitrate to be incorporated into cold packs will be treated the same as the purchase, sale, transfer, or acquisition of ammonium nitrate not to be incorporated into cold packs.

The Department solicits comments on these proposed exemptions. The Department also solicits comments describing uses for ammonium nitrate other than as a fertilizer, a cold packs component, or an explosives ingredient. DHS solicits comments on whether any other uses of ammonium nitrate warrant exemptions.

3. Explosives Exemption

The Department has the discretion to exempt from regulation persons and facilities producing, selling, transferring, or purchasing ammonium nitrate exclusively for use in the production of explosives under a license or permit issued under the Federal explosives laws, 18 U.S.C. Chapter 40, and associated regulations. *See* 6 U.S.C. 488a(f).

ATF is responsible for enforcing federal explosives laws and has established regulations for doing so. *See* 27 CFR Part 555. ATF's regulatory authority over a facility or individual licensed to use an ammonium nitrate-based explosive is limited to ammonium nitrate that (1) has been mixed with a fuel (*i.e.,* ANFO) which is defined in 27 CFR 555.11 as an ''explosive'' and (2) is contained on ATF's List of Explosive Materials. Unblended ammonium nitrate, however, is not defined as an explosive under 27 CFR part 555, and thus ATF does not regulate ammonium nitrate that has not been mixed with a fuel oil, outside of the limited separation distance requirements governing the storage of ammonium nitrate when stored in the vicinity of other high explosives and blasting agents, as set forth in 27 CFR 555.220. This is the case even where unblended ammonium nitrate is being produced, purchased, or stored by a facility regulated by ATF as a manufacturer of ANFO. It is also the Department's understanding that facilities producing ANFO typically have inventories of ammonium nitrate on hand for use in manufacturing ANFO, while entities engaged solely in the re-sale or purchase of ANFO are unlikely to possess any ammonium nitrate other than that which is contained within ANFO mixtures.

The Department is considering three possible approaches for regulating individuals and facilities involved in the production of ANFO. These approaches are summarized in the following table, and discussed thereafter.

	Option 1	Option 2	Option 3
Would DHS opt to exempt individuals and facilities that purchase, sell, or transfer ammonium nitrate solely for use in the production of explosives?	No	Yes	Partial Exemption.
Brief description of option	Ammonium nitrate transactions would be regulated by DHS whether or not the ammonium nitrate purchased, sold, or transferred has been combined with fuel oil to create ANFO.	Ammonium nitrate purchases, sales, or transfers by individuals and facilities solely to enable use of ammonium nitrate in the production of explosives would not be regulated by DHS.	Ammonium nitrate combined with fuel oil (ANFO) would not be regulated by DHS.
Would DHS regulate ammonium nitrate mixtures that are ''explosives'' subject to ATF regulation (i.e., ANFO)?	Yes	No	No.
What duplication would result from this option?	Individuals and facilities would be subject to regulation by both DHS under Subtitle J and ATF under the Federal explosives laws.	Individuals and facilities regulated by ATF under the Federal explosives laws would not be regulated by DHS. No duplication would result.	Certain facilities (e.g., those that produce ANFO) would be subject to both DHS and ATF regulations.
What gaps would result from this option?	No gaps in coverage of ammonium nitrate as it moves through the supply chain.	Could create a considerable gap in regulatory coverage throughout the ammonium nitrate supply chain, as ATF regulations apply solely to ANFO and not the ammonium nitrate used to create it.	Compromise approach closes gaps in security of the ammonium nitrate supply chain.

The first option is to apply the final rule implementing Subtitle J to individuals and facilities that purchase, sell, or transfer ammonium nitrate for use in the production of explosives. Under this approach, such individuals and facilities would be subject to regulation by both DHS under Subtitle J and ATF under the Federal explosives laws. By not exempting ammonium nitrate used in explosives from coverage, DHS would be treating all individuals and facilities who purchase, sell, or transfer ammonium nitrate—whether as part of ANFO mixtures or not—the same. This approach would ensure that there are no gaps in coverage of ammonium nitrate as it moves through the supply chain—ammonium nitrate would be captured under DHS's ammonium nitrate program both before and after being combined with fuel oil to create ANFO, and would be captured under ATF's regulations after being

combined with fuel oil to create ANFO. The major disadvantage of not exempting ammonium nitrate used in explosives is that individuals and facilities who purchase, sell, or transfer ammonium nitrate for the purpose of manufacturing explosives would be subject to potentially duplicative regulatory requirements, including two sets of licensing requirements, two sets of recordkeeping requirements, two sets of point of sale requirements, and inspections by both ATF and DHS. In response to the October 29, 2008 ANPRM, some commenters expressed concern over these potentially repetitive regulatory requirements.

The second option is to entirely exempt from Subtitle J requirements facilities and persons that purchase, sell, or transfer ammonium nitrate solely for use in the production of explosives, as they are already regulated by ATF. In this model, facilities and persons that are licensed by ATF to mix ammonium nitrate with fuel to create ANFO, but that do not purchase, sell, or transfer ammonium nitrate for other purposes and do not perform ammonium nitrate application services, would not be subject to the rule implementing Subtitle J. The primary advantage of this approach is that it would prevent potentially duplicative regulatory requirements from applying to ammonium nitrate facilities and individuals that are already subject to ATF regulations. This approach, however, could create a considerable gap in regulatory coverage throughout the ammonium nitrate supply chain, as ATF regulations apply solely to ANFO and not the ammonium nitrate used to create it. For example, facilities that produce ammonium nitrate to sell to manufacturers of ANFO but who themselves do not produce ANFO would be subject to neither ATF nor DHS regulation under this approach. Similarly, stores of ammonium nitrate at facilities producing ANFO would not be subject to any regulatory requirements (*e.g.,* recordkeeping requirements, reporting of theft or loss requirements) by DHS or ATF under this approach. This would create regulatory gaps in the ammonium nitrate supply chain which could be exploited by terrorists.

The third option would exempt from regulation ammonium nitrate mixtures that are ''explosives'' subject to ATF regulation (*i.e.,* ANFO). DHS is proposing this option in section 31.305 of the proposed rule. Under this approach, entities and individuals that purchase, sell, or transfer ANFO, but who do not produce ANFO or possess ammonium nitrate for other reasons, would be exempt from all Subtitle J requirements and would be subject solely to ATF regulation. Individuals producing ANFO, however, would be subject to the Subtitle J requirements, as they, by necessity, possess ammonium nitrate (which they possess as unblended ammonium nitrate before combining it with fuel oil to make ANFO). This approach recognizes both the fact that ATF already regulates ANFO, as well as the fact that ATF's jurisdiction is limited such that ATF does not regulate the ammonium nitrate used by facilities to make ANFO. Through this compromise approach, individuals and entities whose ammonium nitrate-related operations are already regulated by ATF are spared the duplicative DHS oversight that would result from the first option (discussed above), while gaps in security of the ammonium nitrate supply chain that would be created by the second option (discussed above) are avoided. The primary drawback of this approach is that it would make certain facilities (*e.g.,* those that produce ANFO) subject to both DHS and ATF regulations. To minimize this impact, the Department and ATF currently are discussing ways to coordinate inspections and other compliance activities for these ammonium nitrate facilities, and will work together to ensure that there is minimal duplication of effort or burden caused by this approach, if adopted.

The Department welcomes comments on this proposed approach to ammonium nitrate produced, bought, sold, or transferred exclusively for the purpose of producing explosives. The Department also welcomes comments on any other exemptions that it should consider.

B. Requirements for the Registration of AN Sellers and AN Purchasers (See Sections 31.200–31.250 of the Proposed Rule)

1. Overview

Pursuant to 6 U.S.C. 488a(c), 6 U.S.C. 488a(d), 6 U.S.C. 488e(a)(3)(A), and 6 U.S.C. 488e(a)(3)(B), the Department must establish a process by which persons owning or operating ''AN Facilities'' and persons intending to purchase ammonium nitrate must register with the Department. Section 31.105 of the proposed rule defines an ''AN Facility'' as any person or entity that produces, sells, or otherwise transfers ownership of, or provides application services for, ammonium nitrate. The Department proposes to define ''application services'' in section 31.105 as the physical deposit of fertilizer onto turf, fields, crops, or other agricultural property, where these services are provided by an individual or entity other than the person or entity owning or operating the property upon which the fertilizer is deposited. The Department is interested in receiving comments on these definitions, as well as all other definitions included in the proposed rule.

The proposed registration process would include conducting a check of appropriate identifying information of any person seeking to register against identifying information that appears in the Terrorist Screening Database. Accordingly, prospective applicants would be required to provide specific identifying information to the Department. Appearance in the TSDB is grounds for denial of a registration number (an ''AN Registered User Number''). In section 31.220(a)(1) of the proposed rule, the Department proposes to develop an online web portal through which individuals will apply for AN Registered User Numbers. The Department proposes that AN Registered User Numbers will be disseminated to successful applicants via e-mail or through the DHS web portal. The Department also proposes in section 31.235 to make AN Registered User Numbers valid for a period of five years. Additional proposals on who would be required to register and on various aspects of the registration process are discussed in the following paragraphs. The Department seeks public comment on its proposed registration methodology, on other methods the Department may consider for registration, and on the length of time registration numbers should remain valid.

2. Who Must Register

6 U.S.C. 488a(c)(1)(A) and 6 U.S.C. 488e(a)(3)(B) require owners and operators of AN Facilities (including facilities that provide ammonium nitrate application services) to register with the Department. For the reasons provided below, the Department proposes in section 31.200 that any person who may individually perform a sale or transfer of ammonium nitrate on behalf of an AN Facility would be required to register as an owner or operator. Registered AN Facility personnel (whether owners or operators) involved with sales, transfers, or provision of application services are collectively referred to in the proposed rule as ''AN Sellers,'' of which ''AN Facility Representatives'' and ''Designated AN Facility Points of Contact (POCs)'' are subsets that have special responsibilities under the proposed rule. ''AN Facility Representatives'' are any AN Facility

personnel, be they owners or operators, designated to act on behalf of an AN Facility for purposes of compliance with this rule. A ''Designated AN Facility POC'' is the AN Facility Representative designated by an AN Facility to act as the primary point of contact with the Department on behalf of the AN Facility for purposes of compliance with this rule.

6 U.S.C. 488a(d) and 6 U.S.C. 488e(a)(3)(A) also require anyone who intends to purchase ammonium nitrate to register with the Department. The proposed rule refers to these individuals as ''AN Purchasers.''

Additional details on the registration of AN Sellers, AN Facility Representatives, Designated AN Facility POCs, and AN Purchasers follow. The Department welcomes public comment on the usefulness of these registration categories.

DHS also welcomes public comment discussing other potential registration categories. DHS is interested in comments addressing the benefits and costs of potentially registering organizations in addition to the registration of individual persons. The Department's proposed rule would require only the registration of individual persons, although DHS is interested in receiving comments addressing what benefits and costs, if any, there would be in requiring registration of organizations involved in ammonium nitrate sales, transfers, or application services. DHS is interested in receiving comments addressing which types of organizations (if any) should register—organizations affiliated with AN Facilities, organizations affiliated with AN Purchasers, both, or neither. The Department also invites comments addressing organizational structures, and whether different registration requirements should apply to organizations with different ownership, governance, or operational structures. The Department also seeks comments discussing potential ways in which organizational registration could take place.

3. Registering AN Sellers

6 U.S.C. 488a(c)(1)(A) and 6 U.S.C. 488e(a)(3)(B) require persons who own and persons who operate AN Facilities to register with the Department. DHS believes that Subtitle J's registration requirements for AN Facility personnel will be satisfied if AN Facilities designate AN Sellers, AN Facility Representatives, and/or Designated AN Facility POCs to register and perform the sale, transfer, and application service responsibilities discussed elsewhere in this NPRM. The Department proposes to require only those owners and operators actually involved in sales, transfers, or application services to register. DHS is also considering, however, whether Subtitle J requires all owners to register. DHS welcomes comments on this issue and the benefits and costs imposed by a registration requirement for various types of owners. We understand that some would consider it overly burdensome to require all owners or operators of AN Facilities to register, because not all owners or operators are involved in or have influence over their organizations' ammonium nitrate operations, and because not all owners or operators have the capability to cause ammonium nitrate misappropriation.

Some AN Facilities, such as those owned by large companies, may have many persons who could be considered owners under 6 U.S.C. 488a(c)(1)(A) and 6 U.S.C. 488e(a)(3)(B). The Department requests comment on who should be required to register to fulfill Subtitle J's owner registration requirements for these types of facilities. DHS also requests comment describing how registration of various owners would or would not fulfill the objective of Subtitle J—''to prevent the misappropriation or use of ammonium nitrate in an act of terrorism.'' *See* 6 U.S.C. 488a(a).

The Department is also interested in obtaining more information about individuals who operate (but do not own) AN Facilities, particularly at AN Facilities where owners themselves are not involved in day-to-day operations and do not personally sell, transfer, or perform application services for ammonium nitrate. Operators include employees or other persons who could act on behalf of a facility in conducting sales and transfers, such as sales clerks, cashiers, sales managers, and persons who provide ammonium nitrate transportation services (*e.g.,* delivery truck drivers) or application services. Enabling operator registration is consistent with the Department's authority under 6 U.S.C. 488a(a) and 6 U.S.C. 488e(a)(3)(B), and is necessary in order to ensure that persons with the ability to sell, transfer, or provide application services for ammonium nitrate are not terrorists. DHS welcomes comments on which operators involved in the sale and transfer of ammonium nitrate, or involved in ammonium nitrate application services, should be required and why they should be required to register with the Department.

In light of the Department's understanding of the roles of AN Facility owners and operators, DHS is proposing that several categories of individuals register as ''AN Sellers'':

(1) Any individual who has an ownership interest in an AN Facility may register as an AN Seller.

(2) Any individual designated to act on behalf of an AN Facility for purposes of compliance with this regulation would be required to register as an AN Seller, such as, possibly, a site manager, sales manager, or corporate officer.

(3) Any individual involved in the sale or transfer of ammonium nitrate on behalf of an AN Facility would be required to register as an AN Seller, such as a sales clerk or cashier.

(4) Any individual performing ammonium nitrate application services on behalf of an AN Facility would be required to register as an AN Seller.

DHS proposes that every sale, transfer, or provision of ammonium nitrate application services would have to be conducted by a registered individual (or by multiple registered individuals). Accordingly, while every AN Facility will be required to have at least one AN Seller registered with the Department, not every individual with job at an AN Facility would have to register to be an AN Seller. These proposals would largely give AN Facilities the flexibility to seek registration of and to conduct business with the personnel of their choosing, while also ensuring that all sales, transfers, and application services are conducted by individuals who have been vetted by and registered with the Department.

DHS is proposing that within the category of AN Sellers there be a subcategory of individuals called ''AN Facility Representatives.'' The qualifications and responsibilities of AN Facility Representatives will be discussed in the following section. AN Sellers who are not AN Facility Representatives would have authority to perform all of the regulatory activities that owners or operators must perform pursuant to Subtitle J (*e.g.,* verifying the identities of prospective AN Purchasers, recording the details of completed sales, and handing over possession of ammonium nitrate to approved AN Purchasers), but would not be responsible for ensuring that other AN Facility personnel are following the Department's regulations. For a description of permissible responsibilities of AN Sellers, refer to section 31.210 of the proposed rule.

The Department proposes that every AN Facility would have to have at least one registered AN Seller (*i.e.,* the Designated AN Facility POC), but may seek the registration of as many other AN Facility Representatives and AN Sellers as it deems appropriate. The

Department proposes that whether or not an AN Facility seeks registration of more than a single person will be discretionary.

In section 31.220(c)(3), the Department proposes that each person registering as an AN Seller, AN Facility Representative, or Designated AN Facility POC will be expected to provide information identifying all AN Facilities at which he/she will perform sales or transfers of ammonium nitrate, or on behalf of which he/she will perform application services. In section 31.220(b), the Department proposes that a single individual may serve as an AN Seller for multiple AN Facilities.

4. Registering AN Facility Representatives

The Department recognizes that not all AN Sellers will have the same level of non-regulatory responsibility and authority within an AN Facility, and that some AN Sellers may not be in a position to monitor or control overall AN Facility compliance or the compliance of other AN Facility employees with the final regulations. In light of this, in section 31.215(b), the Department is proposing the creation of a subcategory of individuals called ''AN Facility Representatives'' within the broader class of AN Sellers. The Department proposes that AN Facility Representatives would be AN Sellers who are not only responsible for their own compliance with the regulations, but also would be responsible for the AN Facility's overall compliance with the regulations and the compliance of all other AN Facility employees.

The Department also proposes that, for purposes of these regulations, the definition of ''AN Facility Representative'' be broad enough to include not only individuals who own all or part of AN Facilities, but also any non-owner AN Facility operators, employees, or contractors designated to act on behalf of an AN Facility for purposes of compliance with this proposed rule. Thus, for purposes of the proposed rule, an AN Facility would be allowed to designate as an AN Facility Representative an individual without any ownership in the AN Facility, such as, possibly, a site manager, sales manager, or corporate officer, to meet the ''owner'' and ''operator'' registration requirements of Subtitle J.

In section 31.215(b), the Department proposes that every AN Facility would have to have at least one AN Facility Representative registered on its behalf, but may have as many AN Facility Representatives registered on its behalf as it deems appropriate. Whether or not an AN Facility seeks registration of any additional AN Facility Representatives is entirely discretionary. The Department also proposes that while an AN Facility would have to have at least one registered AN Facility Representative, whether or not an AN Facility seeks registration of any additional AN Sellers who are not AN Facility Representatives is entirely discretionary. Under the Department's proposed approach, an AN Facility may decide that it is most cost-effective to register only AN Facility Representatives; however, in that case, AN Facility Representatives would have to be able to perform all applicable regulatory compliance activities in this rule.

While the Department's proposal does not preclude the registration of multiple AN Facility Representatives for a single AN Facility, each AN Facility will be required to designate a single AN Facility Representative to act as the primary point of contact with the Department on behalf of the AN Facility. This individual will be referred to as the ''Designated AN Facility POC.'' The qualifications and responsibilities of Designated AN Facility POCs will be discussed in the following section.

An individual registering as an AN Facility Representative will be expected to provide the name of and contact information for the Designated AN Facility POC for each AN Facility on behalf of which he/she is registering. Please note that a single individual may serve as an AN Facility Representative for multiple AN Facilities.

5. Registering a Designated AN Facility POC

In section 31.215(a) of the proposed rule, the Department proposes requiring each AN Facility to designate a single AN Facility Representative to act as the primary point of contact with the Department on behalf of the AN Facility. The Department proposes that the Designated AN Facility POC will be the individual who is responsible for contacts with the Department regarding regulatory activities, such as the scheduling of inspections under sections 31.500 and 31.505 of the proposed rule. The Department proposes that the Designated AN Facility POC will have this point-of-contact responsibility in addition to all other AN Facility Representative responsibilities.

Please note that a single individual may serve as a Designated AN Facility POC for multiple AN Facilities.

6. Summary of AN Facility Personnel Registration Proposals

In summary, the Department is proposing that any individual working at or for an AN Facility that performs sales or transfers of ammonium nitrate, or that performs ammonium nitrate application services, would have to register with the Department. Sales, transfers, or application services may only be performed by an individual who successfully registers with the Department and is granted an AN Registered User Number as an AN Seller (or AN Facility Representative or Designated AN Facility POC, as both AN Facility Representatives and Designated AN Facility POCs are subsets of AN Sellers). An AN Facility may have as many or as few registered AN Sellers as it deems fit, and would be required to have at least one registered AN Facility Representative.

AN Facility Representatives have several responsibilities that AN Sellers who are not AN Facility Representatives do not have (*i.e.,* responsibilities for ensuring an AN Facility's holistic compliance with Subtitle J requirements). Each AN Facility would be required to designate a single AN Facility Representative to be that facility's Designated AN Facility POC, who will serve as the facility's primary point of contact with the Department.

The Department welcomes comments on the propriety and effectiveness of this proposed approach, including comments that address the following issues:

- The ownership and management structures of AN Facilities;
- The proposed qualifications for being an AN Facility Representative, including whether individuals who do not own all or part of an AN Facility should be able to register as AN Facility Representatives;
- The proposed regulatory compliance responsibilities of AN Sellers and AN Facility Representatives, which will be described in further detail throughout the remainder of this NPRM;
- Whether or not proof of ownership (for owners) or proof of delegation of authority from company ownership or management (for non-owners) should be required for individuals registering as AN Facility Representatives; and
- The proposal that not all AN Facility owners or operators should be required to register.

The Department also welcomes comments on potential alternative approaches. Several such alternative approaches follow:

- Permitting only individuals who own all or part of an AN Facility to

register, and requiring those individuals to perform all applicable regulatory compliance activities, such as verifying AN Purchasers' AN Registered User Numbers and identities (as described in sections 31.300 and 31.305 of the proposed rule); or

- Permitting only AN Facility Representatives to register, but allowing any facility personnel to conduct ammonium nitrate sales, transactions, and application services; or
- Permitting only AN Facility Representatives to register, but allowing non-registered facility personnel whose names have been provided to the Department to be involved in ammonium nitrate sales, transactions, and application services.

7. Registering AN Purchasers

6 U.S.C. 488a(d) and 6 U.S.C. 488e(a)(3)(A) require any individual who intends to purchase or acquire ammonium nitrate to register with the Department. Specifically, the Department proposes in section 31.205 to require that each individual person attempting to purchase or acquire ammonium nitrate from an AN Facility would be required to register with the Department. Whether that person is the owner of the purchasing entity or simply an employee thereof, the Department proposes to require that person to have a valid AN Registered User Number. Moreover, whether a purchasing entity would want to have a single individual complete all purchases or have multiple individuals with purchasing authority would be within that entity's discretion, but the Department would require any individual attempting to purchase ammonium nitrate to be registered before an AN Facility would be authorized to sell ammonium nitrate to him/her. This is necessary to ensure that each individual taking ownership of ammonium nitrate has been vetted before obtaining ammonium nitrate. The Department welcomes public comment on this proposed approach.

The Department also proposes that it will not require persons receiving ammonium nitrate application services to register as AN Purchasers. The Department does not believe that Subtitle J requires registration and TSDB vetting of owners/operators of agricultural property who receive application services, as long as those individuals do not otherwise qualify for registration under this proposed rule.[1] DHS does not believe that ammonium nitrate fertilizer is likely to be misappropriated for use in acts of terrorism after it has been applied to agricultural property. The Department welcomes public comment on this conclusion.

8. Federal/State/Tribal/Local Government-Owned Entities That Are AN Facilities or AN Purchasers

While the Department does not believe that many Federal, State, tribal, or local governmentally-owned entities engage in the sale, transfer, or purchase of ammonium nitrate, the Department believes that some such entities do. In Subtitle J, Congress did not exempt from regulation AN Facilities that are owned by, or AN Purchasers who work for, Federal, State, tribal, or local governments. Accordingly, the Department is proposing to treat such entities like any other AN Facilities or AN Purchasers, and is proposing to require them to comply with all applicable regulatory requirements. The Department solicits comments on the existence of governmentally-owned entities engaged in the sale, transfer, or purchase of ammonium nitrate; on the existence of government-owned entities that provide application services; examples of such entities; and whether or not such entities should receive special treatment under the Ammonium Nitrate Security Program.

9. Registration Process

The Department is proposing that each applicant for an AN Registered User Number would be required to register as a Designated AN Facility POC, AN Facility Representative, AN Seller, and/or AN Purchaser through an online Web portal (the ''AN User Registration Portal'') developed by the Department and made available via the Internet. Proposed procedures for applying for an AN Registered User Number and registering as a Designated AN Facility POC, AN Facility Representative, AN Seller, and/or AN Purchaser can be found in section 31.220 of the proposed rule. (This NPRM refers to applicants who have successfully registered under these proposed procedures as ''registered users.'')

One alternative to Internet-only registration is to add a phone registration option to the current Internet option. This alternative would provide both an online Web portal and phone-based registration system. Applicants could choose between Web portal registration and phone registration—DHS would accept either if it implemented this alternative. Under this alternative, DHS could accept registration applications over the phone, vet applicants against the TSDB (as described in section III.B.11 of this NPRM), and subsequently mail applicants paper letters containing registration numbers or registration denials. DHS could also potentially provide each applicant with the option of receiving a call, conveying registration results or registration status, prior to receipt of a paper letter in the mail. Calls could be provided to enable applicants to learn their statuses prior to receiving letters in the mail.

Although DHS is proposing Internet-only registration at this time, the Department invites public comments addressing the above alternative registration approach, and any other alternative registration approaches that commenters believe would enable applicants and DHS to efficiently carry out their respective registration obligations. Specifically, DHS is interested in identifying alternative approaches to the Internet that would allow DHS to meet its statutory requirements to, ''to the extent practicable, issue or deny registration numbers under [Subtitle J] not later than 72 hours after the time [DHS] receives a complete registration application, unless [DHS] determines, in the interest of national security, that additional time is necessary to review an application[,]'' and to ''notify a person seeking to register with the Department [* * *] of the status of the application of that person not later than 72 hours after the time [DHS] receives a complete registration application.'' *See* 6 U.S.C. 488a(i)(3). The Department will consider and examine alternatives suggested in public comments in assessing whether to require online registration in the final rule. DHS is particularly interested in receiving public comments addressing the business and economic impacts that various registration alternatives would have on the regulated community, including the costs and benefits of the various alternatives on individual registration applicants. Because it is proposing to implement an online registration system, DHS requests comments addressing the level of access to the Internet that registration applicants currently have, comments addressing the level of access applicants anticipate having in the future, and

[1] If an owner or operator receives and possesses ammonium nitrate for any length of time before it is applied as fertilizer to his/her agricultural property, he/she would qualify as an AN Purchaser under the Department's proposed rule. Such an owner or operator would have to register with DHS as an AN Purchaser, would have to be screened against the TSDB, and would have to fulfill the other proposed obligations of AN Purchasers as described elsewhere in this NPRM.

comments addressing how registration applicants who do not have readily-accessible Internet access could obtain the access necessary to register online. DHS specifically requests information, data, and/or studies pertaining to the regulated community's access to the Internet. The Department will consider any data or studies received on any aspects of registration or on any alternatives, as well as other comments, and if appropriate, modify the registration system proposed in this NPRM.

While not every potential applicant may have personal access to the Internet, the Internet is widely available, such as at public libraries or in other public buildings. AN Facilities are also welcome, but not required, to provide Internet access to potential applicants. The Department believes that there are significant benefits to an online approach. The benefits to applicants, registered users, and the Department of an online approach include: (1) Quicker response from the Department, thereby minimizing the time during which an applicant or registered user would not be able to purchase, sell, or transfer ammonium nitrate, or perform ammonium nitrate application services; (2) ability for an applicant or registered user to access, view, update, and manage his/her personally identifiable information; and (3) ability for a registered user to easily renew his/her AN Registered User Number once it has expired. Additional benefits of online registration, and description of rationales for online registration, follow.

As described in section III.B.11 of this NPRM, DHS proposes to vet registration applicants against the TSDB as part of the Ammonium Nitrate Security Program. Accurate TSDB vetting depends upon DHS obtaining accurate information from registration applicants. Because TSDB vetting results or submissions of inaccurate or improper registration information to DHS could lead to registration denials or revocations (as described in sections III.B.12 and 13 of this NPRM), preventing individuals from being able to access ammonium nitrate and thus impacting their livelihoods, DHS believes that it should implement the most accurate registration system possible. DHS believes that implementing an online registration system would reduce the risk of human error in submission and transcription of registration information, as compared to the phone-in registration alternative mentioned above or as compared to mail-in or other possible registration alternatives. DHS is seeking comment on this assumption. DHS also believes that implementing an online registration system would reduce the risks of lost paperwork or misdirected mail, both by registration applicants and by DHS, which would be inherent in any alternative registration systems relying on mailed correspondence or paper forms. While allowing registration over the phone would eliminate the potential loss of mailed paper forms by registration applicants, it would not entirely eliminate the potential for some paper letters from DHS containing registration numbers or registration denials to be lost. DHS thus believes that an online registration system is likely to be the most accurate registration system possible; it would be less prone to the types of errors identified above than alternative registration systems. DHS seeks comments on how errors could be reduced through alternative registration systems.

DHS proposes Internet-only registration because Subtitle J directs the Department to ''establish procedures to efficiently receive applications for registration numbers.'' *See* 6 U.S.C. 488a(i)(1)(A). A major goal of Subtitle J is to expedite and streamline the registration and regulatory compliance processes that are part of the Ammonium Nitrate Security Program. *See, e.g.,* 6 U.S.C. 488a(i)(3)(A) (directing DHS to, ''to the extent practicable, issue or deny registration numbers under [Subtitle J] not later than 72 hours after the time [DHS] receives a complete registration application [* * *]''); 6 U.S.C. 488a(i)(1)(A) (directing DHS to ''*promptly* issue or deny'' registration numbers (emphasis added)); 6 U.S.C. 488a(i)(1)(B) (directing DHS to structure the program to maximize the number of registration applicants that apply for registration soon after implementation of the program); 6 U.S.C. 488a(i)(3)(B) (directing DHS to notify registration applicants whenever there are delays in processing registration applications); and 6 U.S.C. 488a(i)(4)(A) (directing DHS to create an expedited appeals process for individuals whose registration applications are denied). Implementing an online registration system would not only enable DHS to return registration results to applicants over the Internet within the 72-hour timeframe set forth in 6 U.S.C. 488a(i)(3)(A), it would also enable DHS to return registration results to applicants faster than under any of the other possible registration alternatives, thereby best achieving the goal of expediting registration that underlies Subtitle J. The Department proposes the Internet-only approach because mail processing times, delays associated with transcribing phoned-in registrations, and delays associated with generating and processing paper forms mailed to or from DHS would slow DHS's responses to registration applications. For these reasons, a phone-in or mail-in registration alternative would not expedite registration in comparison to online registration. However, DHS seeks comment on whether or not possible registration delays would be preferable to the burdens of having to access public computers that would be imposed by an Internet-only registration approach on individuals without readily-accessible Internet access. DHS is also seeking comments on other ways in which these burdens might be mitigated for those without readily-accessible Internet access.

DHS acknowledges that the proposed Internet-only registration procedures, if finalized, would impose costs and burden on regulated members of the public. Online registration would likely be more burdensome for individuals without readily-accessible access to the Internet than for others. Subtitle J, however, specifies that persons do not need to be registered to purchase, sell, transfer, or receive ammonium nitrate until six months after the issuance of the final rule implementing the Ammonium Nitrate Security Program. *See* 6 U.S.C. 488e(e). DHS believes that this six-month period will provide a sufficient opportunity for those without readily-accessible Internet access to obtain the brief Internet access necessary to register with the Department. The period of time between issuance of a final rule and implementation of the registration requirement (*i.e.,* that individuals possess AN Registered User Numbers) should minimize burden or business disruption felt by registration applicants. Nevertheless, the Department seeks comments on the likely burdens (in terms of time and expense) on those who would need to access public computers in order to register online. DHS also seeks comments on any additional costs incurred besides those associated with registration.

In Subtitle J, 6 U.S.C. 488a(i)(1)(B) additionally directs the Department to take steps to maximize the number of registration applications that are submitted and processed during the six months following the issuance of the final rule. In order to accomplish this, the Department intends to engage in a concerted outreach effort both immediately before and immediately after the release of the final rule in an

effort to raise awareness of Subtitle J's registration requirements and the process for completing them. The Department welcomes public comments on both potential outreach targets and other steps the Department can take to maximize the number of registration applications that are submitted and processed during the initial six-month registration period.

The Department's proposal would require online registration, but would not mandate what sort of Internet access registration applicants must obtain in order to complete the registration process. As mentioned previously, registration applicants could use public computers and internet connections, or computers and Internet connections provided by AN Facilities, in order to register if they do not have access to personal computers and the internet. DHS recognizes that use of public computers or unsecured Internet connections can increase privacy risks and risks of loss of sensitive personal data. The Department has published a Privacy Impact Assessment concurrently with publication of this NPRM addressing these risks, and also addressing other privacy risks and safeguards relevant to the Ammonium Nitrate Security Program. The Department's Ammonium Nitrate Security Program Privacy Impact Assessment can be found online, at *http://www.dhs.gov/privacy.* DHS encourages members of the public to read the Privacy Impact Assessment, and submit comments on this NPRM regarding the risks and safeguards that is addresses. The Department is particularly interested in receiving comments addressing privacy risks associated with use of public computers or unsecured internet connections as part of the proposed registration process, and comments addressing how DHS and registration applicants can protect personal information and sensitive information transmitted online.

In summary, the Department proposes that registration applications be collected only though an online web portal. The Department seeks public comments on this proposed Internet-only approach, and on potential alternative approaches. DHS will consider alternatives submitted in selecting which type of registration system to implement as part of the final rule.

10. Initial Applications

Upon accessing the AN User Registration Portal, DHS proposes in section 31.220(c)(1) that each applicant will be asked a series of questions designed to allow the Department to vet the individual against the TSDB, and to subsequently enable point of sale verifications. The Department is proposing in section 31.220(c)(1) that each applicant provide his/her name, address, telephone number, photo identification document type, photo identification document issuing entity, photo identification document number, place of birth, date of birth, citizenship, and gender, along with any other information deemed necessary by the Department to carry out TSDB vetting.

To ensure that appropriate user roles are assigned to each AN Registered User Number, DHS proposes in section 31.220(b) that each applicant would also be asked to declare his/her ammonium nitrate user status in general terms (*i.e.,* AN Seller; AN Facility Representative; Designated AN Facility POC; AN Purchaser). In section 31.220(b), the Department proposes to allow an applicant the ability to register as both an AN Seller and an AN Purchaser. The Department is interested in receiving comments on the utility of this proposal.

The Department is also proposing in section 31.220(c)(3) that each AN Seller, AN Facility Representative, and Designated AN Facility POC would be required to submit information identifying all AN Facilities at or for which he/she serves as an AN Seller, AN Facility Representative, or Designated AN Facility POC.

Under section 31.220(c)(1) of the proposed rule the Department may also collect information necessary to enable it to verify applicants' enrollments in other TSDB vetting programs. The Department is considering exercising its authority under 6 U.S.C. 488a(i)(6)(A) to recognize the results of equivalent TSDB vetting conducted on applicants enrolled in other appropriate DHS programs where possible. This approach would limit the number of instances in which different DHS programs may vet the same applicant against the TSDB. The Department would appreciate comments regarding whether or not this or other information would be worthwhile to collect, and regarding the burden on the regulated community of such collection. The Department also welcomes public comment on the totality of this proposed registration application process, including public comment discussing potential alternative processes.

Pursuant to the Privacy Act, 5 U.S.C. 552a(e)(3), DHS intends to provide notice to individuals submitting information to DHS through the AN User Registration Portal about the authority for DHS's collection of application information, the purposes for collecting application information, the uses of application information, and the impacts on individuals by providing or failing to provide application information. DHS expects to provide this notice electronically, within the AN User Registration Portal.

11. Applicant Vetting Process

In section 31.225, the Department proposes to vet applicants against the TSDB and/or verify each applicant's enrollment in a Department program that conducts equivalent TSDB vetting prior to issuing him/her an AN Registered User Number. *See* 6 U.S.C. 488a(i)(2)(A) (requiring TSDB vetting). Under section 31.230(b)(1) of the proposed rule, applicants whose identifying information appears in the TSDB may be denied AN Registered User Numbers. *See* 6 U.S.C. 488a(i)(2)(B). Each applicant who applies for an AN Registered User Number will be vetted against the TSDB before being approved to purchase, sell, transfer, or provide application services for ammonium nitrate.

The Department is aware that some applicants may have already been vetted against the TSDB as part of other DHS programs prior to submission of their AN Registered User Number applications. Sections 31.220 and 31.230 of the proposed rule would enable, but would not require, DHS to recognize the results of TSDB vetting completed by other DHS programs as part of AN Registered User Number application reviews. The Department is interested in receiving comments on the utility of this proposal.

The Department welcomes public comment on the means by which it proposes to accomplish vetting, and on any other aspects of the proposed approach to vetting applicants for AN Registered User Numbers. At a date after publication of the Ammonium Nitrate Security Program NPRM in the **Federal Register**, but prior to final rule implementation, the Department will publish in the Federal Register both a System of Records Notice (SORN) for the Ammonium Nitrate Security Program and a separate Notice of Proposed Rulemaking proposing to exempt the Ammonium Nitrate Security Program from certain Privacy Act requirements. The Department will also publish, on the Department's Web site, a Privacy Impact Assessment. In these documents the Department will outline the potential privacy impacts of the proposed rule, including the privacy impacts of the vetting process and the circumstances under which DHS intends to share information collected

under the Ammonium Nitrate Security Program with Federal law enforcement agencies as a part of law enforcement investigations into terrorist ties of applicants for AN Registered User Numbers.

12. Notification of Approval or Denial

Consistent with 6 U.S.C. 488a(i)(3)(A) and 6 U.S.C. 488a(i)(3)(B), to the extent practicable, the Department intends to approve or deny each application for an AN Registered User Number, and to issue each AN Registered User Number, not later than 72 hours after the time the Department receives a complete application. The Department may deny an applicant an AN Registered User Number if that applicant's name or identifying information appears in the TSDB. *See* 6 U.S.C. 488a(i)(2)(B). The Department proposes in section 31.230(c) to provide notification of registration application approval or denial to each applicant electronically.

If a registration application is approved, the notification of such approval will contain a unique AN Registered User Number assigned to the applicant. The Department is considering including in the notification issued to each successful applicant a certificate including the AN Registered User Number that he/she can print and keep as part of his/her records and use to facilitate the AN Purchaser verification process.

The Department welcomes public comment on the efficiency and sufficiency of notifying applicants of AN Registered User Number approvals and denials via e-mail or other electronic means, and also welcomes public comment addressing potential alternative means for providing such notice, such as notification via telephone or letter. The Department also welcomes public comment addressing the appropriate contents of registration approvals and denials.

The Department intends to issue or deny AN Registered User Numbers within 72 hours of application, as required by Subtitle J. *See* 6 U.S.C. 488a(i)(3). When this is not practicable, or when the Department determines in the interest of national security that additional time is needed to review an application, the Department proposes to provide notice of delay to applicants whose registration determinations are delayed in the same manner as approvals or denials will be issued, as stated in section 31.230(e) of the proposed rule. The Department welcomes public comment on the efficiency, sufficiency, costs and benefits of this manner of providing notice of delay, and also welcomes public comment addressing potential alternative means of providing such notice.

13. Revocation of Registration Numbers

Under section 31.245 of the proposed rule, the Department proposes to revoke an individual's AN Registered User Number upon determining that it is in the interest of national security to revoke that AN Registered User Number based on the results of the activities described in section 31.225 of the proposed rule, or that the AN Registered User holding that AN Registered User Number obtained it by submitting fraudulent or false information. *See* 6 U.S.C. 488a(i)(7)(A). To support these determinations, in section 31.225(b) the Department proposes to recurrently vet individuals who have previously been issued AN Registered User Numbers. *See* 6 U.S.C. 488a(i)(7)(A). As appropriate, before revoking an individual's AN Registered User Number, the Department must provide notice to the individual, and after the revocation of the AN Registered User Number, the Department must provide the affected individual an opportunity to appeal. *See* 6 U.S.C. 488a(i)(7)(B). In sections 31.245(b) and (c), DHS proposes that notification of revocation will be provided to each affected individual in writing, along with instructions on the process for appealing the Department's revocation decision. The appellate process will mirror that provided to individuals whose initial applications for AN Registered User Numbers are denied, as described below in the following section and in section 31.250 of the proposed rule. The Department welcomes public comment on the efficiency and sufficiency of this method of providing notice of revocation and on the proposed appeals process, and also welcomes public comment on potential alternative means for either.

14. Appealing Registration Denials and Registration Revocations

This section discusses proposed appeal procedures for persons denied AN Registered User Numbers and for persons whose AN Registered User Numbers are revoked under Subtitle J. These procedures can be found in section 31.250 of the proposed rule. A later section of this NPRM, section III.H, discusses proposed adjudication and appeal procedures for persons and entities issued civil penalties by the Department under Subtitle J. These two sets of procedures are mutually exclusive; the Department proposes that registration and revocation appeals will be governed only by the appeals mechanisms described in this section of this NPRM, while civil penalty adjudications and appeals will be governed only by the mechanisms described in section III.H of this NPRM.

The reason for this mutual exclusivity is because registration denials and revocations are fundamentally different from imposition of civil penalties under the Department's proposed rule. Under the Department's proposal, individuals or other entities will only be issued civil penalties for violating the rules of the Ammonium Nitrate Security Program. Individuals or other entities will not be issued civil penalties for having their registrations denied or revoked. Adjudication or appeal of civil penalties will thus involve assessment of whether or not individuals or other entities have violated the final Ammonium Nitrate Security Program rules. On the other hand, appeal of denial or revocation of registration numbers will involve review of the completeness and accuracy of registration applications, and review of TSDB vetting results and national security interests if applicable. The appeal procedures listed in this section of the NPRM are intended to enable reviews of registration application denials and revocations of registration numbers, while the adjudication and appeal procedures listed in section III.H are intended to enable reviews of civil penalties and of alleged regulatory violations.

Subtitle J requires the Department to afford persons denied AN Registered User Numbers, and persons whose AN Registered User Numbers are revoked, the opportunity to appeal such denials and revocations in an expedited manner. *See* 6 U.S.C. 488a(i)(4). The Department proposes to fulfill this requirement by permitting each person to request copies of the materials on which denial or revocation was based, and to file statements explaining why he/she believes that he/she has been inappropriately denied registration and containing any applicable supporting evidence, to be reviewed by the Department. These proposed appeals procedures are based, in part, on appeals procedures the Department offers as part of the Transportation Worker Identification Credential (TWIC) and Hazardous Materials Endorsement (HME) programs. *See* 49 CFR 1515.9(a)–(b); 49 CFR 1515.5.

Specifically, the Department proposes that, after having received an ammonium nitrate registration denial or revocation, a person may initiate an appeal by filing a written Request for Materials requesting copies of the materials on which denial or revocation was based. The Department proposes to

require that each Request for Materials be submitted to the Department within 60 days of the date of denial or revocation.

The Department proposes that after the receipt of a Request for Materials, it will send the appellant a DHS Response containing copies of the releasable materials upon which denial or revocation was based. DHS will not include any classified information in this DHS Response nor will it include any other information or material protected from disclosure under law, although as appropriate it will include unclassified summaries of classified evidence supporting denial or revocation. The Department proposes that it will serve its DHS Response on the appellant within 60 days of Request for Materials receipt, unless additional time is required in the interest of national security.

Upon review of those releasable materials, the Department proposes that an appellant may reply to the Department with a Request for Appeal containing the rationale or information upon which he/she disputes the Department's denial or revocation determination. The Department proposes that an appellant will have 60 days from the date of the Department's Response in which to file such rationale or information. The Department proposes that after reviewing this rationale or information, it will serve the appellant with a Final Determination of the Department's resolution of his/her appeal. The Department proposes that it will perform this service within 72 hours of Request for Appeal receipt, to the extent practicable, as required by 6 U.S.C. 488a(i)(4)(A)(ii).

For good cause shown, the Department additionally proposes to grant appellants extensions of the 60-day appeals submission periods mentioned above. This will afford appellants the necessary time in which to work with other government agencies to correct records and materials contributing to the Department's denial/revocation determinations when those records and materials contain incorrect or outdated information.

The Department welcomes public comment on this appeals mechanism, and also welcomes public comment on potential alternative appeals mechanisms.

15. Registration Updates and Expiration

Under Subtitle J, DHS may require registrants to update registration information submitted to DHS ''as appropriate.'' *See* 6 U.S.C. 488a(6)(b). Pursuant to this authority, section 31.220(a)(2) proposes to require registration applicants and AN Registered Users to update submitted information within 30 days of a change to any of the information submitted as part of the application (*e.g.,* name, address). An applicant or AN Registered User would be able to update his/her information through the proposed AN User Registration Portal. DHS seeks public comment on its proposed approach to updating registration information, including how often and under what circumstances to require registrants to update the information submitted to DHS as part of registration. DHS also requests public comments on potential alternative approaches to requiring registration information to be updated through the proposed AN User Registration Portal, including comments on the feasibility and practicality of allowing updates to be accomplished over the telephone or through the mail.

The Department proposes in section 31.235 of the proposed rule to make each AN Registered User Number issued under Subtitle J valid for five years after the date of issuance (unless revoked before expiration pursuant to 6 U.S.C. 488a(i)(7)). Under this proposal, the Department expects many applicants to apply to renew their AN Registered User Numbers every five years.

In proposing five years as the duration of each AN Registered User Number, the Department is seeking to balance the benefits of requiring renewals against the burdens to both the regulated community and the Department of the renewal process. As part of its evaluation of potential expiration and renewal processes, the Department has considered the expiration/renewal schedules for ATF's Federal Explosives Regulations (three years), for DHS programs that conduct TSDB vetting (*e.g.,* five years for TSA's TWIC program and five years for U.S. Customs and Border Protection's Trusted Traveler programs), and for various State ammonium nitrate licensing regulations (generally one year). The Department believes that the five-year renewal cycle for AN Registered User Numbers is appropriate because it will minimize the burden on the regulated community, in comparison to screening programs with shorter renewal cycles. Additionally, a five-year validity period aligns with DHS's practice of recurrently vetting information against the TSDB for five years as part of certain transportation and critical infrastructure security programs.

The Department proposes in section 31.240 to allow each AN Registered User to apply for a five-year extension of his/her AN Registered User Number via the proposed AN User Registration Portal anytime beginning 60 days prior to the expiration of his/her AN Registered User Number through one year after the expiration of his/her AN Registered User Number. After completion of the renewal process, each renewed AN Registered User Number will be valid for an additional five years. To facilitate this, the Department intends to maintain an AN Registered User's registration application information for a period of one year following the expiration of his/her AN Registered User Number. If an individual fails to renew his/her AN Registered User Number within one year of its expiration, the AN Registered User Number will be permanently retired. Such an individual will need to apply for a new AN Registered User Number to purchase, sell, transfer, or provide application services for ammonium nitrate after his/her initial AN Register User Number has been permanently retired.

The Department seeks public comment on this proposed approach, including the utility, benefits, and costs of requiring re-registration of ammonium nitrate users in general, and on the proposed five-year time period in particular.

16. Initial Six-Month Registration Period

6 U.S.C. 488e(e) specifies that persons do not need to be registered to purchase, sell, transfer, or receive ammonium nitrate until six months after the issuance of the final rule implementing Subtitle J. 6 U.S.C. 488a(i)(1)(B) directs the Department to take steps to maximize the number of registration applications that are submitted and processed during the six months following the issuance of the final rule. In order to accomplish this, the Department intends to engage in a concerted outreach effort both immediately prior to and immediately following the release of the final rule in an effort to raise awareness of Subtitle J's registration requirements and the process for completing them. The Department welcomes suggestions on both potential outreach targets and other steps the Department can take to maximize the number of registration applications that are submitted and processed during the initial six-month registration period.

C. Purchaser Verification Activities (See Sections 31.300–31.310 of the Proposed Rule)

1. Overview

Subtitle J specifies that only individuals with valid AN Registered

User Numbers may purchase ammonium nitrate, and that AN Sellers would be required to refuse to sell ammonium nitrate to prospective AN Purchasers who do not possess valid AN Registered User Numbers. *See* 6 U.S.C. 488e(a)(2) and 6 U.S.C. 488e(a)(3). To this end, AN Sellers would be required to verify that each prospective AN Purchaser has a valid (*i.e.,* current and authentic) AN Registered User Number prior to transfer of ammonium nitrate. Subtitle J also requires AN Sellers to verify each prospective AN Purchaser's identity prior to transfer of ammonium nitrate to that prospective AN Purchaser. *See* 6 U.S.C. 488a(e)(2)(D). DHS therefore proposes to require that an AN Facility refuse to sell or transfer ammonium nitrate to a prospective AN Purchaser whose identity or AN Registered User Number the AN Seller is unable to verify. These proposed requirements can be found in section 31.300 of the proposed rule, and are further discussed throughout the remainder of section III.C of this NPRM.

In addition to verifying the identity and AN Registered User Number of a prospective AN Purchaser, if an AN Purchaser whose identity and AN Registered User Number has been verified uses an agent on his or her behalf at the point of sale, the AN Seller must also verify the identity of the agent. *See* 6 U.S.C. 488a(e)(2)(D). Identity verification of AN Purchasers (and, where applicable, their agents) by AN Sellers is to occur in accordance with procedures proposed in section 31.300.

AN Facilities would also be required to record certain information regarding prospective AN Purchasers (and, if applicable, the agents acting on their behalves) for each sale or transfer as part of Subtitle J's recordkeeping requirements. *See* 6 U.S.C. 488a(e)(2).

2. Manner of Sale or Transfer of Ammonium Nitrate

The Department is aware that the ways in which sales and transfers of ammonium nitrate are conducted can vary by AN Facility, and that differences in ammonium nitrate transaction protocols could impact the timing and performance of identity verification and other required point of sale activities. Through conversations with industry, the Department has identified three principal transaction formats commonly used to sell or transfer ammonium nitrate: (1) The AN Purchaser appears at an AN Facility and takes possession of ammonium nitrate from the AN Seller directly; (2) the AN Purchaser places an advanced order either in person or through other means (*e.g.,* telephone, online), and the AN Seller delivers ammonium nitrate to the AN Purchaser; or (3) the AN Purchaser places an advanced order either in person or through other means (*e.g.,* telephone, online), and an agent acting on behalf of the AN Purchaser takes possession of the ammonium nitrate from the AN Seller. Other transaction formats are also possible.

In addition to the aforementioned approaches to transferring possession of ammonium nitrate as part of a sale or transfer, depending on the financial arrangements entered into between an AN Facility and an AN Purchaser, the payment of funds or other services in exchange for ammonium nitrate may occur prior to, concurrent with, or after the actual transfer of possession of ammonium nitrate.

The Department is interested in comments regarding the frequency of these various modes of delivery and payment, as well as any other transactional formats that are used to sell or transfer ammonium nitrate.

The verification activities described in section III.C of this NPRM are required for each sale or transfer of ammonium nitrate. The Department seeks comments on its proposed definition of ''transfer,'' including what should be considered a transfer subject to Subtitle J. For purposes of this rule, the Department is proposing that ''transfer'' of ammonium nitrate be defined generally as ''[t]he transfer of possession or ownership of ammonium nitrate from one person or entity to another person or entity for use outside of the AN Facility from which the ammonium nitrate is being transferred. Transfers of ammonium nitrate include transfers of possession or ownership that occur as part of sales and other business or commercial transactions, and also include transfers of possession or ownership that are not part of sales or other business or commercial transactions. The physical deposit of fertilizer onto turf, fields, crops, or other agricultural property is not a transfer of ammonium nitrate.'' Elaboration on this definition follows.

The Department is aware that transaction protocols may be different for sales or transfers that occur as part of imports or exports of ammonium nitrate than for purely domestic sales or transfers. As part of this proposed rule, DHS proposes to regulate all ammonium nitrate transfers that occur within the United States. As such, DHS would require the verification and recordkeeping activities described below whenever possession of ammonium nitrate changes hands inside the United States. For example, if an individual brings ammonium nitrate into the country and transfers possession of it to another person within the United States, the verification and recordkeeping activities described below would be required. Similarly, if an individual in the United States transfers possession of ammonium nitrate to another person who intends to export that ammonium nitrate, the verification and recordkeeping activities described below would be required. Verification and recordkeeping would not be required, however, if an individual transports ammonium nitrate out of the country as long as there is no transfer of possession of the ammonium nitrate when it is inside the United States. Likewise, verification and recordkeeping would not be required if an individual brings ammonium nitrate into the country as long as there was no transfer of possession of that ammonium nitrate when it is inside the United States. DHS seeks comments on this proposal, on the methods of conducting ammonium nitrate imports and exports, and on any potential alternative treatments of imported or exported ammonium nitrate.

When ammonium nitrate is used or moved within a single AN Facility, or when possession of ammonium nitrate changes within a single AN Facility but that ammonium nitrate does not leave the AN Facility, the verification activities described below are not required. The reason for this is that, under Subtitle J, DHS is authorized only to regulate sales, transfers, and application services; how ammonium nitrate is stored, used, or processed within the confines of individual AN Facilities is not the subject of Subtitle J. As such, persons using or moving ammonium nitrate within an AN Facility, or obtaining possession of ammonium nitrate for use within the same AN Facility, would not need to be registered with DHS.

The application of ammonium nitrate fertilizer to property by an application service would not be regulated as a transfer under the Department's proposal. The Department does not believe that ammonium nitrate fertilizer is likely to be misused in acts of terrorism after it has been applied to agricultural property. Accordingly, farmers and other persons who have ammonium nitrate fertilizer spread on their agricultural property do not need to register with the Department, nor do their identities need to be verified by AN Sellers prior to their receipt of

application services.[2] Pursuant to the Department's proposal, however, transfer of ammonium nitrate from an AN Facility to a separate application service would be regulated. Regulation of application services is required under Subtitle J. *See* 6 U.S.C. 488(2). Specifically, the Department believes that regulation of transfers to application services is necessary in order to ensure that terrorists cannot easily obtain ammonium nitrate by infiltrating, posing as, or working for application services. The Department seeks comments on these proposals, and is particularly interested in comments discussing interactions between AN Facilities, application services, and ammonium nitrate end users.

Persons who transport ammonium nitrate from one AN Facility to a delivery location outside that AN Facility (*e.g.,* truck drivers) conduct regulated transfers under this proposed rule, regardless of whether the AN Facility and delivery location are owned or operated by the same business or organization, and are therefore subject to this regulation. Ammonium nitrate transportation would be regulated in three ways under the proposed rule, depending upon particular transporters' relationships with AN Facilities or AN Purchasers. Any particular transportation would have to be regulated pursuant to one (and only one) of the three options listed immediately below.[3]

(1) *Transporters who are the agents of AN Purchasers.* Any person possessing valid photo identification could transport ammonium nitrate from an AN Facility to an AN Purchaser, pursuant to the Department's proposed rules for ''AN Agents'' as described in sections III.C.4 through III.C.9 of this NPRM. ''AN Agent'' transporters would not need to be registered with or vetted by DHS. Any AN Purchaser to which an ''AN Agent'' transporter delivers ammonium nitrate, however, would need to be registered with and vetted by the Department. Similarly, any AN Seller from whom an ''AN Agent'' transporter obtains ammonium nitrate (*i.e.,* any AN Seller who provides ammonium nitrate to be loaded into an ''AN Agent'' transporter's truck or other vehicle) would need to be registered with and vetted by the Department.

Before an ''AN Agent'' transporter can pick up or obtain possession of ammonium nitrate (*i.e.,* before it can be loaded into his/her truck or other vehicle), his/her identity would need to be verified by the AN Facility from which he/she seeks to pick up ammonium nitrate, as described in sections III.C.8 and III.C.9 of this NPRM. Before an ''AN Agent'' transporter can pick up ammonium nitrate, the AN Facility from which he/she seeks to pick it up would also need to verify that he/she has legitimately been asked to serve as an ''AN Agent'' by a registered AN Purchaser. See sections III.C.7 and III.C.9 of this NPRM. Before an ''AN Agent'' transporter can pick up ammonium nitrate, the AN Facility from which he/she seeks to pick it up would also need to verify that the AN Purchaser to whom the ''AN Agent'' transporter plans to deliver the ammonium nitrate is properly registered with DHS. See sections III.C.4, 6, and 9 of this NPRM.

Under this proposed rule, an ''AN Agent'' transporter would not need to perform any identity verification or registration verification on the AN Purchaser to whom he/she delivers ammonium nitrate. Similarly, ''AN Agent'' transporters would not need to maintain any records or paperwork under this proposed rule.

(2) *Transporters who work for AN Facilities.* Transporters could work for or deliver ammonium nitrate on behalf of AN Facilities, and could register under the Department's proposed rules as AN Sellers for those facilities. See section III.B.3 of this NPRM. Transporters who register as AN Sellers would be vetted against the TSDB. See sections III.B.10 and III.B.11 of this NPRM.

Once registered as an AN Seller on behalf of a particular AN Facility, a transporter could pick up or obtain possession of ammonium nitrate from that AN Facility (*i.e.,* it could be loaded into his/her truck or other vehicle at that AN Facility) without having to undergo the identity verification or AN Registered User Number verification activities described in sections III.C.3 through III.C.9 of this NPRM. Before a transporter who is registered as an AN Seller delivers or drops off ammonium nitrate to an AN Purchaser, however, he/she (or other registered employees of the AN Facility with which he/she is associated) would have to conduct registration verification and identification verification on the AN Purchaser receiving the ammonium nitrate. See sections III.C.3 through III.C.9 of this NPRM. The AN Facility with which the transporter is associated would also have to maintain records of the transporter's delivery. See section III.D of this NPRM.

(3) *Independent transporters.* Transporters who fit into neither of the previous two categories would be regulated as both AN Purchasers and AN Sellers under the Department's proposed rule. As such, they would have to register with the Department and be vetted against the TSDB. See sections III.B.10 and III.B.11 of this NPRM. Any AN Seller from whom an independent transporter picks up or obtains ammonium nitrate (*i.e.,* any AN Seller who provides ammonium nitrate to be loaded into the independent transporter's truck or other vehicle) would also need to be registered with and vetted by the Department. Similarly, any AN Purchaser to whom an independent transporter delivers ammonium nitrate would also need to be registered with and vetted by the Department.

Independent transporters would need to be registered as AN Purchasers in order to pick up or obtain ammonium nitrate (*i.e.,* in order to have it loaded into their trucks or other vehicles). Before an independent transporter can pick up or obtain possession of ammonium nitrate (*i.e.,* before it can be loaded into his/her truck or other vehicle), his/her identity would need to be verified and his/her AN Registered User Number would need to be verified by the AN Facility from which he/she seeks to pick up or obtain ammonium nitrate. See sections III.C.4, III.C.5, and III.C.9 of this NPRM.

Independent transporters would also need to be registered as AN Sellers in order to deliver ammonium nitrate to other AN Purchasers. Before an independent transporter delivers or drops off ammonium nitrate to an AN Purchaser, he/she (or other employees registered on behalf of his/her organization) would have to conduct a registration verification and identity verification on the AN Purchaser receiving the ammonium nitrate. See sections III.C.3 through III.C.9 of this NPRM. The AN Facility with which the independent transporter is associated would also have to maintain records of the transporter's delivery. See section III.D of this NPRM.

The Department is interested in comments addressing coverage of truck drivers and other transporters of ammonium nitrate. The Department is particularly interested in comments

[2] Persons who perform application services, however, must be registered with DHS under the proposed rule. For elaboration on this registration requirement, see section 31.210(c) of the proposed rule and see sections III.B.2 and 3 of this NPRM.

[3] Transporters of ammonium nitrate can also be subject to other Federal and State regulations regarding the transportation of hazardous materials. Registration and compliance with DHS's proposed Ammonium Nitrate Security Program would not relieve transporters of duties or registration requirements under USCG, TSA, or DOT rules, or under other Federal or State programs. See sections II.D.3 and II.D.4 of this document for descriptions of other select rules and programs.

addressing transporters' relationships to AN Facilities and AN Purchasers, and addressing transporters' abilities to perform the activities required of regulated persons. The Department specifically requests comments addressing the three types of transportation arrangements described above, including comments discussing whether any particular types of transportation arrangements should be exempt from proposed regulatory requirements, and if so, discussing why particular transportation arrangements should be exempt.

DHS proposes that transportation of ammonium nitrate where possession moves between different AN Facilities or other locations would be regulated as a transfer. Both of these types of transfers would require all the registration, verification, and recordkeeping activities required of transfers elsewhere in this NPRM. A person delivering ammonium nitrate from one AN Facility to another location would be regulated as part of one of the three transporter categories listed above, regardless of whether that person's delivery location is part of the same company or business as the AN Facility from which he/she obtains the ammonium nitrate transported.

By proposing to require that transportation between related business entities qualifies as a regulated transfer of ammonium nitrate, DHS would ensure that all entities from which transportation of ammonium nitrate originates have AN Registered Users on staff who are screened for terrorist ties who can be responsible for carrying out the security requirements of Subtitle J. Likewise, by proposing to require that transportation between related business entities qualifies as a regulated transfer of ammonium nitrate, DHS would also ensure that all entities receiving shipments of ammonium nitrate have AN Registered Users on staff who are screened for terrorist ties and who can be responsible for carrying out the security requirements of Subtitle J. Similarly, by proposing to require that transportation between related business entities qualifies as a regulated transfer of ammonium nitrate, DHS would also ensure that intra-company transportation of ammonium nitrate is conducted by AN Registered Users or ''AN Agents.'' These features of the Department's proposed rule would help to ensure that persons screened for terrorist ties (or their agents) would be responsible for a given company's or business's ammonium nitrate during times when that ammonium nitrate might be most vulnerable to misappropriation.

The Department seeks comments on the proposal that transportation of ammonium nitrate would be regulated where possession moves between different locations but where ownership is not transferred (*i.e.,* where transfer takes place within a single corporate entity). DHS realizes, however, that this proposal could have a significant impact on businesses with multiple locations, and that it might not increase ammonium nitrate security for every AN Facility or entity to which it would apply. Accordingly, the Department seeks comments on this proposal. DHS also seeks comments suggesting alternative ways in which Subtitle J's requirements regarding the regulation of ammonium nitrate transfers could be achieved. The Department is interested in comments generally describing the organizational structures and transportation needs of the companies or other entities owning or operating AN Facilities, and in comments addressing whether transportation between locations owned or operated under the same corporate structure should be exempt from coverage under the Ammonium Nitrate Security Program.

3. Required Verification Activities

Based on statutory requirements and the Department's understanding of the ways in which sales and transfers of ammonium nitrate typically occur, the Department is proposing to require that an AN Seller perform the specific verification activities discussed below for each sale or transfer of ammonium nitrate.

The AN Seller would always be required to verify the currency and authenticity of the prospective AN Purchaser's AN Registered User Number.

The AN Seller would be required to verify the prospective AN Purchaser's identity as specified by DHS. The manner of verification of a prospective AN Purchaser's identity would vary depending on whether or not the AN Purchaser has opted to use an agent (an ''AN Agent'') to procure ammonium nitrate for him/her. If the AN Purchaser opted not to use an agent, then the AN Seller verifies the AN Purchaser's identity based upon the visual check of the AN Purchaser's photo identification. If the AN Purchaser opted to use an agent, then the AN Seller verifies the AN Purchaser's identity by submitting certain information provided by the AN Purchaser to the Department for comparison against information contained in the AN Purchaser's AN Registered User Number application.

In the event that a prospective AN Purchaser uses an agent to complete the transaction, the AN Seller would also be required to verify both (1) the agent's identity based upon a visual check of the agent's photo identification, and (2) that the agent is acting on the approved AN Purchaser's behalf.

Each of these required verification activities is described in greater detail in the following sections of the NPRM. Although the Department proposes to require these verification activities for sales and transfers of ammonium nitrate, DHS proposes not to require these verification activities prior to provision of ammonium nitrate application services. The Department seeks comments on its proposal not to require verification activities prior to provision of ammonium nitrate application services.

4. Verification of the Currency and Authenticity of a Prospective AN Purchaser's AN Registered User Number

In order to bolster the effectiveness of AN Registered User Numbers in preventing the misappropriation of ammonium nitrate, DHS proposes that the AN Seller will be required to verify the currency and authenticity of a prospective AN Purchaser's AN Registered User Number prior to completing a sale or transfer of ammonium nitrate. DHS proposes in section 31.305(a) to provide each AN Seller the capability to verify the currency and authenticity of a prospective AN Purchaser's AN Registered User Number either electronically through a web portal designed by the Department (the ''Purchaser Verification Portal'') or telephonically through a call center maintained by the Department (the ''Purchaser Verification Call Center''). The Department proposes in section 31.305(a)(3) to compare the prospective AN Purchaser's name and AN Registered User Number, which a prospective AN Purchaser would be required to provide an AN Seller for submission to DHS, to information contained in the Department's AN Registered User database, and to provide rapid confirmation or rejection of the prospective AN Purchaser's information to the AN Seller via the same mechanism (*i.e.,* the Purchaser Verification Portal or the Purchaser Verification Call Center). This approach provides a reasonable degree of confidence as to the currency and authenticity of the AN Purchaser's AN Registered User Number. Both the proposed Purchaser Verification Portal and the proposed Purchaser Verification Call Center are described in greater detail below.

Verification of a prospective AN Purchaser's AN Registered User Number would be required regardless of whether or not the AN Purchaser opts to use an agent on his or her behalf to take possession of ammonium nitrate.

5. Verification of a Prospective AN Purchaser's Identity When the AN Purchaser Opts Not To Use an Agent

Consistent with 6 U.S.C. 488a(e)(2)(D), the Department proposes that the AN Seller will be required to verify the prospective AN Purchaser's identity. If the AN Purchaser opts not to use an agent, DHS proposes in section 31.305(b) that the AN Seller would be required to verify, by performing a visual check of a photo identification document such as a driver's license or passport, the identity of the AN Purchaser no later than when the AN Purchaser directly takes possession of ammonium nitrate from the AN Seller at the completion of the sale or transfer.

The Department proposes using a definition of ''photo identification document'' similar to the definition used by the Department's Secure Flight Program, to establish what qualifies as an acceptable form of identification for this verification process. Specifically, in section 31.105, the Department proposes defining ''photo identification document'' as ''[a]ny of the following documents containing a unique document number: (1) An unexpired passport issued by a foreign government which contains a photograph; or (2) An unexpired document issued by a U.S. Federal, State, or tribal government that includes the following information for the person: (i) Full name; (ii) date of birth; and (iii) photograph; or (3) Such other documents that the Department may designate as valid identification documents.'' *Cf.* 49 CFR 1560.3. The Department also assumes that each AN Purchaser and each AN Agent will possess a photo identification document. The Department seeks comments on this proposed requirement and assumption, including comment on the forms of identification that should be acceptable for purposes of the visual identification verification check.

6. Verification of a Prospective AN Purchaser's Identity When the AN Purchaser Opts to Use an Agent

Consistent with 6 U.S.C. 488a(e)(2)(D), the Department proposes in section 31.310(a) that the AN Seller will be required to verify the prospective AN Purchaser's identity with DHS when the prospective AN Purchaser chooses to use an agent to take possession of ammonium nitrate. Specifically, before completing a sale or transfer of ammonium nitrate the AN Seller would have to provide certain prospective AN Purchaser information (*e.g.,* name; photo identification document number; AN Registered User Number) to DHS either electronically through the Purchaser Verification Portal or telephonically through the Purchaser Verification Call Center. The Department proposes to compare this information, which a prospective AN Purchaser would be required to provide to an AN Seller for submission to the Department, to information contained in the Department's AN Registered User Database. The Department would provide rapid confirmation or rejection of the prospective AN Purchaser's information to the AN Seller via the same mechanism (*i.e.,* the Purchaser Verification Portal or the Purchaser Verification Call Center). The Department believes that this confirmation or rejection would take about the same amount of time as it takes merchants to receive credit card authorizations at retail stores.

This approach would enable use of an agent when it is not possible to verify the identity of the AN Purchaser in person (*i.e.,* by conducting a visual inspection of the photo identification of the AN Purchaser and comparing the photo identification with the AN Purchaser physically present). The Department seeks comments on this approach, including comments addressing whether AN Purchasers would be likely to provide identity verification information to AN Sellers themselves (*e.g.,* by providing this information to AN Sellers over the telephone), or whether AN Purchasers would be likely to ask their agents to provide this information to AN Sellers in person. DHS also seeks comments on the advisability, costs, and benefits of enabling agents to provide AN Purchasers' identity verification information directly to AN Sellers, and seeks comments on possible alternative methods that could be employed to verify AN Purchasers' identities in sales or transfers involving AN Agents.

Both the proposed Purchaser Verification Portal and the proposed Purchaser Verification Call Center are described in greater detail below.

7. For Sales Involving Agents, Verification That the Agent Is Acting on Behalf of the AN Purchaser

Subtitle J limits registration and vetting requirements to AN Purchasers, and does not extend registration and vetting requirements to the agents of AN Purchasers. *See* 6 U.S.C. 488a(d) and 6 U.S.C. 488a(e). In order to help minimize the likelihood that agents would be used to circumvent the intentions of Subtitle J, the Department believes it is imperative for AN Sellers to ensure that an agent is acting at the direction of a registered AN Purchaser before the AN Seller transfers possession of ammonium nitrate to that agent. To accomplish this, the Department is considering various approaches:

(1) Requiring AN Purchasers to submit the names of their agents to DHS via the AN User Registration Portal, and requiring the AN Seller to confirm with DHS, prior to transferring possession of ammonium nitrate to an agent, that the name of that agent has been previously submitted to DHS by the relevant AN Purchaser.

(2) Requiring the AN Seller to orally confirm with the prospective AN Purchaser prior to each transfer of ammonium nitrate that the agent is acting on behalf of the AN Purchaser.

(3) Allowing both options, whereby an AN Seller first should check with DHS to see if the prospective AN Purchaser has submitted the name of the agent to DHS. If not, then the AN Seller would be required to orally confirm with the prospective AN Purchaser that the agent is acting on his/her behalf. DHS proposes this third approach in section 31.310(b) of the proposed rule.

Under the first approach, each AN Purchaser would be required to provide to DHS the names of any agents that might act on his/her behalf at the point of sale. AN Purchasers would submit names of agents to DHS via the AN User Registration Portal. An AN Purchaser could submit an agent's name when he/she applies for an AN Registered User Number or at any other time prior to conducting a purchase involving that agent. Then, prior to transferring possession of ammonium nitrate to an agent, an AN Seller would need to verify with the Department that the prospective AN Purchaser has designated the agent as an approved agent to represent the AN Purchaser at the point of sale. This verification would occur through the same mechanism that is used for the other prospective AN Purchaser identity verification activities (*i.e.,* the Purchaser Verification Portal or the Purchaser Verification Call Center). Note, however, that agent information that the AN Purchases and AN Sellers provided to the Department would not be vetted against the TSDB or otherwise checked by the Department; rather, it would simply be maintained in the AN Registered User Database as a data field linked to the AN Purchaser for use in the agent verification process.

Under the second approach, the Department would require an AN Seller to verify with the prospective AN Purchaser that the agent is actually acting on behalf of the prospective AN Purchaser for each specific transaction. Much like the other verification activities contained in the proposed rule, this could occur at the time the prospective AN Purchaser places the order, when the agent arrives to take possession of ammonium nitrate, or any other time, so long as it occurs prior to the AN Seller transferring possession of ammonium nitrate to the prospective AN Purchaser's agent. Note, if this approach were adopted, the Department would propose requiring this confirmation to occur for each transaction/occurrence in which an agent is taking possession of ammonium nitrate; a blanket verification of an agent by an AN Purchaser would not be acceptable. Additionally, as an e-mail or letter can be easily forged, under this approach the Department would require that the AN Seller receive this verification orally (*e.g.,* in person, telephonically) from the prospective AN Purchaser.

The third approach—the option the Department proposes to use in this NPRM—is a combination of the first two approaches. Specifically, AN Purchasers would be expected to provide the Department with the names of their agent(s), and an AN Seller would be expected to verify either through the Purchaser Verification Portal or Purchaser Verification Call Center that the agent information has been provided by the AN Purchaser to the Department. As opposed to the first approach under which a sale cannot occur unless the agent's name has been provided to the Department by the prospective AN Purchaser, this third option would allow the AN Seller to complete a sale or transfer after either (1) verifying that the agent has been designated by the prospective AN Purchaser through the Purchaser Verification Portal or Purchaser Verification Call Center, or (2) orally confirming with the prospective AN Purchaser that the agent is acting on the prospective AN Purchaser's behalf for the sale or transfer at issue. The Department expects that in the majority of cases, this oral confirmation would occur telephonically. This third option has the benefit of minimizing the point of sale impact of the agent verification process while allowing a means for a sale or transfer to be completed even if a prospective AN Purchaser forgets or is otherwise unable to provide the Department with the agent's name prior to using the agent at the point of sale. For these reasons, the Department proposes this third approach.

If DHS implements either the first approach or the third approach in an Ammonium Nitrate Security Program final rule, the Department will construct the AN User Registration Portal such that AN Purchasers could submit the names of their agents to DHS through that portal. If so, DHS would require AN Purchasers to notify agents that their names could be submitted to DHS in this manner. DHS seeks public comment on how such notification should be carried out, if the Department implements either the first approach or the third approach.

The Department seeks comment on the benefits, costs, economic impacts, and practicality of all these approaches, as well as any potential alternate approaches for verifying that an AN Agent is acting on behalf of a prospective AN Purchaser.

8. Verification of the Agent's Identity Based on the Visual Check of the Agent's Photo Identification

Consistent with 6 U.S.C. 488a(e)(2)(D), DHS proposes in section 31.310(c)(1) that the AN Seller would be required to verify, by performing a visual check of a photo identification document such as a driver's license or passport, the identity of the agent taking possession of ammonium nitrate from the AN Seller at the completion of a sale or transfer. This visual check would mirror the process and requirements used by the AN Seller when performing a visual check on an AN Purchaser, when an AN Purchaser takes possession of ammonium nitrate.

9. Timing of Verification Activities

All of the aforementioned verification activities would be required to occur before the AN Seller transfers possession of ammonium nitrate to the prospective AN Purchaser or the agent acting on the prospective AN Purchaser's behalf. Outside of that requirement, the time at which the AN Seller performs the verification activities would be entirely within the discretion of the AN Seller. For instance, in a situation where the AN Purchaser places an advance order for ammonium nitrate to be picked up at a later date, the AN Seller may perform these activities at the time of sale or at the time of transfer of possession.

The proposed rule would regulate all transfers of ammonium nitrate, including both transfers that involve payments or sales, and transfers that do not involve payments or sales. Note that AN Sellers may transfer possession of ammonium nitrate to AN Purchasers or their agents only after the verification activities discussed above have been completed. Payment for transfer of possession may happen at any time, either before or after verification activities have been completed.

10. Departmental Role in Verification Process

As part of the verification process, the Department proposes to require AN Sellers to provide the Department with sufficient information to verify (1) the currency and authenticity of prospective AN Purchasers' AN Registered User Numbers, and (2) prospective AN Purchasers' identities when AN Purchasers use agents. The Department also proposes to enable AN Sellers to verify through DHS, where applicable, that prospective AN Purchasers have submitted the names of the agents acting on their behalves to the Department. To help AN Sellers accomplish this, the Department is considering developing a secure AN Purchaser verification web portal (''Purchaser Verification Portal'') and a call center (''Purchaser Verification Call Center'') through which AN Sellers can submit information to the Department that will allow the Department to nearly immediately (1) Verify or disaffirm prospective AN Purchasers' AN Registered User Numbers, (2) verify or disaffirm prospective AN Purchasers' identities, and, where applicable, (3) verify or disaffirm the preapproval of agents.

11. Purchaser Verification Portal

The first option the Department is considering is to develop a Purchaser Verification Portal that would be available via the Internet to registered AN Sellers only. To gain access to the portal, AN sellers would be asked to provide their AN Registered User Number, a password, and potentially other identifying information. The Department proposes in sections 31.305 and 31.310 that, upon accessing the portal, an AN Seller would enter into the system, at a minimum, the prospective AN Purchaser's name and AN Registered User Number to verify the prospective AN Purchaser's AN Registered User Number. If the prospective AN Purchaser uses an agent, then the AN Seller would enter into the system the prospective AN Purchaser's photo identification document number (along with additional photo identification document information, such as type of photo identification document, and photo identification document issuing entity), to aid in verifying the prospective AN Purchaser's identity. This information

should allow the Department to verify for the AN Seller that the prospective AN Purchaser is who he/she claims to be and that he/she possesses a valid AN Registered User Number. The Department is interested in receiving comments on the information it proposes to collect for AN Purchaser verification purposes, including specific comments on potential photo identification document numbers that the Department may collect, such as driver's license or passport numbers.

The Department considered requiring individuals' Social Security Numbers in lieu of photo identification document numbers. The Department believes, however, that photo identification document numbers are preferable to Social Security Numbers for two significant reasons. First, photo identification document numbers are typically contained on physical identification cards that include photographs that could be visually checked by AN Sellers. Second, use of photo identification document numbers would minimize the potential privacy impact on AN Purchasers of having to share their Social Security Numbers. The Department seeks comments on the costs and benefits of Social Security Number use.

The Department is also considering requiring AN Sellers to enter additional information into the Purchaser Verification Portal, such as each quantity of ammonium nitrate sold or transferred and each prospective AN Purchaser's proposed use of the ammonium nitrate to be procured. Such additional information could help strengthen the AN Purchaser identification process and facilitate the performance of compliance audits and inspections, and would generally help to prevent the misappropriation or use of ammonium nitrate in acts of terrorism. Comments on the utility of collecting additional information, as well as the types of information that it may be worthwhile for the Department to collect, are welcome.

The Department proposes that information entered into the Purchaser Verification Portal will be transmitted to the Department which, upon receipt, will check the information against the AN Registered User records maintained by the Department. The Department would electronically notify the AN Seller of the result once the Department (1) verifies or disaffirms the prospective AN Purchaser's identity (*i.e.,* determines whether the identifying information provided matches the information submitted in the prospective AN Purchaser's AN Registered User Number application), if appropriate, (2) verifies that the prospective AN Purchaser's AN Registered User Number is current and authentic (*i.e.,* matches the AN Registered User Number assigned to the prospective AN Purchaser), and (3) verifies that the prospective AN Purchaser has listed his/her agent with the Department as authorized to act on his/her behalf, if appropriate.

To support recordkeeping requirements, the Department is considering providing to the AN Seller, along with its web verification notice, a confirmation number and/or printable web verification notice record receipt. For recordkeeping requirements, see sections III.C.4–8. Comments on the utility, benefits, and costs of providing either a confirmation number or printable record receipt via the Purchaser Verification Portal are welcome.

The Department proposes that if the Department notified an AN Seller that the identity and AN Registered User Number of a prospective AN Purchaser were verified, then the AN Seller would proceed with the second portion of the identity verification—a visual check of the identification document of the individual taking possession of the ammonium nitrate (*i.e.,* the AN Purchaser or, where applicable, his or her agent).

If the Department were to discover that either (1) the prospective AN Purchaser's identity does not match the information of record for the given AN Registered User Number, or (2) the AN Registered User Number provided by the prospective AN Purchaser is not current and authentic, then the Department would issue a notice to the AN Seller indicating that the sale or transfer of ammonium nitrate to the prospective AN Purchaser is not authorized. The Department anticipates that the confirmation or denial notice resulting from the web verification process will typically be sent to and received by the AN Seller quickly, much like how merchants receive approval or denial notices prior to authorizing purchases via credit card.

As mentioned earlier, the Department is aware that sales and transfers of ammonium nitrate occur in many different ways, and that AN Facilities' varying ammonium nitrate sales procedures can impact the timing and performance of verification activities. Depending on the structure of the transaction, the manner in which the AN Seller goes about verifying the prospective AN Purchaser's identity, AN Registered User Number, and use of an agent may vary. In all cases, DHS proposes that the AN Seller will complete these verifications prior to transferring possession of ammonium nitrate.

The Department welcomes public comment on the overall effectiveness, propriety, benefits, and costs of these Purchaser Verification Portal identity and registration verification mechanisms, and also welcomes public comment on or suggestion of potential alternative methods for identity and registration verification.

12. Purchaser Verification Call Center

The second option the Department is considering is to develop a Purchaser Verification Call Center. The overall principle behind a call center verification system is similar to the principle behind the Purchaser Verification Portal—that is, a prospective AN Purchaser's identity (for sales involving an agent) and possession of a current and authentic AN Registered User Number could be verified quickly prior to the transfer of possession of ammonium nitrate through use of a call center verification system. Under this approach, AN Sellers would call a toll-free phone number established by the Department where they would either talk to a person or be led through a series of telephone tree menus. During the phone call, each AN Seller would be expected to provide, at a minimum, his/her name, his/her AN Registered User Number, and the prospective AN Purchaser's name, AN Registered User Number, and, for sales involving an agent, the AN Purchaser's photo identification document number. The Department is also considering requiring or enabling AN Sellers to provide additional information, such as the quantity and intended use of the ammonium nitrate being sold or transferred. The operator or automated telephone system would enter the information provided into the Department's Registered User database system, wait for electronic confirmation, and then provide verbal confirmation to the caller along with a confirmation number for that specific transaction.

A call center may be preferable to a web portal, as presumably all AN Facilities have telephones while not all AN Facilities have computers with Internet access, particularly at the point of sale. There are some potential disadvantages, though, including the likelihood that the call center approach would take more time per transaction than the web portal approach, and that it would be significantly more costly for the Department to establish and operate a call center.

13. Purchaser Verification Portal and Call Center

A third option is for the Department to establish both a Purchaser Verification Portal and a Purchaser Verification Call Center. This is the approach the Department is proposing in sections 31.305 and 31.310. This approach is identical to the Purchaser Verification Portal option described above, integrated with the Purchaser Verification Call Center option. The advantage of this alternative is that all AN Facilities would be accommodated—those with telephone access only and those with both telephone and Internet access who find the verification web portal option more efficient. This approach, however, would be the most costly of the alternatives for the Department to establish and operate.

As indicated in sections 31.305 and 31.310 of the proposed rule, DHS proposes that as part of the verification processes described in section III.C of this NPRM, AN Purchasers and/or AN Agents will be required to provide information to AN Facilities in order to enable use of the Purchaser Verification Portal or the Purchaser Verification Call Center. DHS will require AN Facilities to notify the AN Purchasers and AN Agents providing this information about why it is collected. DHS will also require AN Facilities to notify AN Purchasers and AN Agents that the information they provide may be shared with DHS. DHS seeks public comment on how such notifications should be carried out.

The Department welcomes public comment on the overall effectiveness and propriety of these alternative identity and registration verification mechanisms, and also welcomes public comment on or suggestion of potential alternative methods for identity and registration verification.

14. Suspicious Purchases and Attempted Purchases of Ammonium Nitrate

Subtitle J encourages AN Sellers to be wary of suspicious purchases and attempted purchases of ammonium nitrate. *See* 6 U.S.C. 488c(c)(1) and 6 U.S.C. 488f. To this end, Subtitle J encourages AN Sellers to exercise their commercial rights to deny the sale or transfer of ammonium nitrate to prospective AN Purchasers when prospective AN Purchasers attempt to purchase ammonium nitrate under ''suspicious'' circumstances. *See* 6 U.S.C. 488f. Furthermore, Subtitle J encourages AN Sellers to contact law enforcement entities, as appropriate, in response to ''suspicious'' purchases or ''suspicious'' attempted purchases. *See* 6 U.S.C. 488c(c)(1)(A). Moreover, Subtitle J provides that if an AN Seller refuses to sell or transfer ammonium nitrate to any person, or in good faith discloses to the Department or appropriate law enforcement authorities the actual or attempted purchase or transfer of ammonium nitrate, based on a reasonable belief that the person seeking to purchase or transfer ammonium nitrate may use the ammonium nitrate to create an explosive device to be employed in an act of terrorism or for another unlawful purpose, the AN Seller shall not be liable in any civil action relating to that refusal to sell or that disclosure. *See* 6 U.S.C. 488f(a).

To assist AN Sellers in determining what a ''suspicious'' circumstance is and what appropriate responsive actions are, Subtitle J requires the Department to issue guidance addressing ''suspicious'' circumstances. *See* 6 U.S.C. 488c(c)(1). The Department will issue such guidance, along with other statutorily required guidance, along with the final rule implementing the Ammonium Nitrate Security Program. The Department welcomes public comment on topics to be addressed in this guidance, including comment on ''suspicious'' purchases and attempted purchases. The Department also welcomes public comment on the formats in which its guidance materials should be published and the means of dissemination of guidance materials.

D. Recordkeeping (See Sections 31.315 and 31.515 of the Proposed Rule)

1. Overview

Pursuant to Subtitle J, AN Facilities must maintain records of each sale or transfer of ammonium nitrate for a two-year period beginning on the date of that sale or transfer. *See* 6 U.S.C. 488a(e)(1). AN Facilities must take reasonable actions to ensure the protection of the information included in such records. *See* 6 U.S.C. 488a(e)(3). 6 U.S.C. 488b authorizes DHS to inspect and audit AN Facility records for the purpose of monitoring compliance with Subtitle J or for the purpose of deterring or preventing the misappropriation or use of ammonium nitrate in acts of terrorism.

2. Entities Responsible for Keeping Records

Pursuant to Subtitle J and section 31.315(a) of the proposed rule, AN Facility Representatives must ensure that records of each sale or transfer of ammonium nitrate are maintained. *See* 6 U.S.C. 488a(e)(1). As discussed above, the Department is aware that there are many types of facilities selling or transferring ammonium nitrate, including but not limited to corporations, partnerships, cooperatives, and sole proprietorships. For many of these organizational forms, it may not be reasonable to expect an AN Facility Representative to be engaged in or have direct oversight over recordkeeping at the AN Facility. In recognition of this, the Department is proposing that while a facility's AN Facility Representative or Representatives would be responsible for their AN Facility's compliance with the proposed rule's recordkeeping requirements, any facility employee, regardless of whether or not he/she is a registered AN Seller, could perform recordkeeping activities on behalf of the facility. The Department, however, is proposing in sections 31.315(d) and (e) to require each AN Facility Representative to ensure that his/her facility maintains records in compliance with the rule. DHS welcomes public comment on the propriety and effect of this proposal.

AN Purchasers are under no obligation to maintain records pursuant to Subtitle J.

3. Records To Be Kept

For each sale or transfer of ammonium nitrate, the Department is proposing in section 31.315(a) of the proposed rule to require that the records kept by the AN Facility include the date of sale/transfer; form and amount of payment; quantity of ammonium nitrate sold/transferred; type of packaging; delivery location; the name, address, telephone number, AN Registered User Number, and photo identification document information of the AN Purchaser to whom it was sold/transferred; and, if the AN Purchaser uses an agent at the point of sale, the name, address, telephone number, and photo identification document information of the agent acting on behalf of the AN Purchaser.

In addition to keeping records containing the information listed above, DHS proposes to require AN Facilities to maintain records related to the verification of a prospective AN Purchaser AN Registered User Number's currency and authenticity, and verification of a prospective AN Purchaser's and (where applicable) agent's identity. These requirements are discussed in sections 31.315(a)(8) and (9) of the proposed rule. Such requirements are important to allow the Department to monitor compliance under the regulations, to deter or

prevent the misappropriation or use of ammonium nitrate in acts of terrorism, and to support the investigation of reported theft or loss of ammonium nitrate. The Department welcomes comment on the benefits and costs of maintaining records regarding the AN Purchaser (and, where applicable, agent) verification process.

In addition to the proposed records requirements discussed above, the Department also is considering requiring AN Facilities to keep photocopies of each individual AN Purchaser's or agent's photo identification document and/or printouts of the Department's electronic verification of the authenticity and currency of each individual's AN Registered User Number (if the Department decides to use the Purchaser Verification Portal). The Department is interested in receiving public comment regarding what types of records should be considered adequate records for the purpose of showing completed verification activities, as well as what the costs and benefits of generating and maintaining these records would be.

In addition to transaction records and verification records, there are a variety of other records that may be necessary for AN Facilities to maintain in order to support compliance monitoring by the Department. These include: (1) Maintenance by each AN Facility of copies of the AN Registered User Number certificates of the AN Facility Representatives, Designated AN Facility POC, and/or all other AN Sellers employed by the facility (note, this presumes that the Department does in fact decide to issue approved applicants certificates along with their AN Registered User Numbers); (2) copies of reports of theft or loss made to the Federal Government pursuant to Subtitle J; (3) any reports showing the reconciliation of sales/transfers and inventory; and (4) any orders or other correspondence issued by the Department to an AN Facility regarding activities regulated by Subtitle J. These records all may have value in monitoring compliance with the regulations or in deterring or preventing the misappropriation or use of ammonium nitrate in acts of terrorism. The Department is considering requiring AN Facilities to maintain these records, and welcomes public comment on the value of each and the costs associated with each.

As indicated in sections 31.315(b) and (c) of the proposed rule, DHS proposes that as part of ammonium nitrate sales or transfers AN Purchasers and/or AN Agents will be required to provide some of the information listed in this section of the NPRM to AN Facilities in order to enable facility recordkeeping. DHS will require AN Facility personnel to notify the AN Purchasers and AN Agents providing this information about why it is collected. DHS will also require AN Facility personnel to notify AN Purchasers and AN Agents that the information they provide may be shared with DHS. DHS seeks public comment on how such notifications should be carried out.

4. Length of Retention of Records

Subtitle J provides that each record of sale or transfer of ammonium nitrate must be maintained by the relevant AN Facility for at least two years from the date of the transaction that generates that record. *See* 6 U.S.C. 488a(e)(1)(A). For consistency purposes, in section 31.315(d) of the proposed rule the Department proposes that an AN Facility would be required to maintain for two years all records required under this rule. The Department seeks comments on this proposal.

5. Format and Storage of Records

Pursuant to 6 U.S.C. 488a(e)(3), and as proposed in section 31.315(e), an AN Facility must take ''reasonable actions'' to ensure protection of the information included in records maintained pursuant to Subtitle J. Subtitle J, however, does not explicitly prescribe any format or storage requirements. In an effort to minimize the burden on regulated AN Facilities and to provide flexibility to allow AN Facilities to leverage existing recordkeeping efforts to meet this regulatory requirement, the Department proposes allowing AN Facilities to choose methods of records storage for themselves. The Department is considering, however, providing AN Facilities the capability to create and maintain appropriate records in the web-based Purchaser Verification Portal. This would give AN Facilities the opportunity to use the portal to store their records, but would not require them to do so. The Department welcomes comments on this proposal.

DHS proposes that AN Facilities be allowed to maintain records in paper or electronic format, and that AN Facilities may use whatever template or form they choose for individual records. An AN Facility simply would be required to ensure that its records contain all of the data required by the final rule implementing the Ammonium Nitrate Security Program, and to make the records available for inspection by DHS officials as described in section 31.515 of the proposed rule. DHS proposes that each AN Facility be required to make records available within the specified timeframes, and to take reasonable actions to protect the records. The Department proposes allowing an AN Facility to maintain records onsite or offsite, so long as the records are made available for inspection when DHS inspectors arrive for inspections where the AN Facility has received prior notice of the inspection or within four hours of inspectors' arrivals for unannounced inspections.

The Department also proposes giving AN Facilities flexibility to determine what constitutes ''reasonable actions'' for ensuring the protection of records, and is considering defining ''reasonable actions'' as actions commensurate with the actions that an AN Facility would take to secure sensitive or confidential business records. Typical actions could include storage in locked file cabinets for paper recordkeeping or password-protecting files for electronic recordkeeping.

The Department welcomes public comment on the proposed record formatting options, security standards, and production timeframes, as well as any potential alternative approaches or additional requirements the Department should consider.

E. Reporting of Theft or Loss of Ammonium Nitrate (See Sections 31.400–31.405 of the Proposed Rule)

1. Overview

Pursuant to Subtitle J, any AN Facility Representative who has knowledge of theft or unexplained loss of ammonium nitrate is required to report such theft or loss to Federal law enforcement authorities within 24 hours of the time at which knowledge of theft or loss is acquired. *See* 6 U.S.C. 488d. The Department additionally encourages all other individuals who have possession of or control over ammonium nitrate to report any thefts or unexplained losses of ammonium nitrate of which they become aware. Voluntary reporting is provided for in section 31.405(b) of the proposed rule.

2. Who Must Report Theft or Loss

Although any employee at an AN Facility may report a theft or loss of ammonium nitrate, DHS proposes in section 31.400 that it will be the responsibility of each facility's AN Facility Representatives to ensure that theft or loss from the facility is reported in a timely fashion. Additionally, while there is no legal requirement for AN Purchasers or agents acting on their behalf to report thefts or unexplained losses of ammonium nitrate, the Department encourages them to do so

using the same procedures that AN Facility personnel would use.

3. Level of Theft or Loss Warranting Reporting

Any time an AN Facility Representative or any other individual employed by an AN Facility comes to believe that a theft of ammonium nitrate has occurred, AN Facility Representatives would be responsible for ensuring that that theft is reported using the procedures set forth in section 31.400. Determining when to report a loss, however, is not as straightforward a proposition, because it is typical for small percentages of bulk ammonium nitrate to be ''lost'' as part of normal bulk ammonium nitrate industrial and shipping business practices. While individually such losses may tend to be de minimis, in the aggregate they may amount to large amounts of lost ammonium nitrate. The Department seeks not to unduly burden individuals involved in the manufacturing, storage, transportation, or use of bulk ammonium nitrate, but on the other hand does seek to impose loss reporting requirements which will aid in preventing misappropriation of ammonium nitrate. Accordingly, the Department proposes to require that AN Facility Representatives ensure that losses of ammonium nitrate from their facilities be reported using the procedures described below when those losses deviate from the amount of loss that typically occurs during routine production, storage, transportation, or use of ammonium nitrate.

The Department seeks public comment on its proposed approach to defining the circumstances under which a theft or loss would be required to be reported and whether the theft/loss reporting requirements should apply only to theft or loss of ammonium nitrate above a minimum threshold amount. If a minimum threshold amount should apply, the Department is also interested in receiving comments addressing the level at which this amount should be set. The Department is particularly interested in public comments addressing how theft/loss reporting requirements should vary, if at all, based on AN Facility business size or other AN Facility business characteristics.

4. Process for Reporting Theft or Loss

The Department proposes in section 31.405(a) to require reporting of theft/loss to ATF. The Department will coordinate with ATF to ensure proper tracking and coordination of reported ammonium nitrate thefts and losses; however, ATF, not the Department, will conduct appropriate law enforcement actions in response to theft/loss reporting, due to ATF's unique explosives-related law enforcement mission.

The Department welcomes public comment on this proposal to leverage ATF's theft/loss reporting and response capabilities, and welcomes public comment on potential alternative reporting mechanisms. The Department also welcomes public comment on the information to be required as part of each theft/loss report. The Department proposes to require that each theft/loss report be made to ATF in a manner prescribed by DHS after consultation with ATF, and contain information similar to that currently required by ATF for reports of theft or loss of explosives. This likely would involve modified versions of the process and tools established by ATF in support of the ATF regulations regarding the reporting of theft or loss of explosive materials. *See generally* 27 CFR 555.30. ATF requires reporting of the theft or loss of explosives by telephoning a nationwide toll free number, followed up with submission to ATF of a completed form detailing the incident. The Department would work with ATF to determine the appropriate information to be reported and the proper template for a form specific to reporting the theft or loss of ammonium nitrate. The Department welcomes public comment on this proposed approach for reporting theft and loss of ammonium nitrate, and also welcomes public comment addressing any potential alternative approaches or additional requirements the Department should consider.

Although there is no statutory requirement for AN Facility Representatives or other registered individuals who have knowledge of thefts or unexplained losses to report such incidents to local law enforcement, the Department encourages AN Facilities and individuals to do so in addition to reporting the theft or loss to ATF.

F. Inspections and Audits (See Sections 31.500–31.515 of the Proposed Rule)

Subtitle J states that DHS ''shall establish a process for the periodic inspection and auditing of the records maintained by owners of ammonium nitrate facilities for the purpose of monitoring compliance * * * or for the purpose of deterring or preventing the misappropriation or use of ammonium nitrate in an act of terrorism.'' *See* 6 U.S.C. 488b. As part of these inspections and audits, the Department proposes to inspect and audit the records required to be maintained under the ''recordkeeping'' requirements of the final rule implementing the Ammonium Nitrate Security Program. (See section III.D of this NPRM for discussion of proposed recordkeeping requirements.) The Department welcomes public comment on the types of records and other items or activities it should review during inspections or audits.

The Department proposes to conduct inspections at AN Facilities and/or any other locations where records subject to the inspection/audit requirements are located. The Department also proposes that it conduct inspections during AN Facilities' regular business hours except when warranted by exigent circumstances. The Department welcomes public comment on inspections, including comments addressing how often inspections should be undertaken.

Generally speaking, the Department will provide an AN Facility, via its Designated AN Facility POC, with a minimum of 24 hours notice prior to conducting an inspection or audit, as proposed in section 31.505(a). The Department, however, proposes to reserve the right to conduct audits or inspections without prior notice when warranted by exigent circumstances or when delay in conducting an inspection might be seriously detrimental to security, as described in sections 31.505(a)(1) and (2). Such inspections, conducted without prior notice, will require approval by a supervisory manager at DHS.

The Department has also considered not providing notice prior to conducting inspections or audits in order to align with inspections processes carried out by other agencies, such as ATF. The Department welcomes comments addressing how much notice, if any, should be provided to AN Facilities prior to inspections or audits, including comments addressing whether the Department should align its notice procedures with ATF's (or with any other entity's) notice procedures.

When prior notice of an inspection has been provided to an AN Facility, DHS expects that the facility will have all records required to be maintained by this rule available for review/inspection/audit at the time of arrival of inspectors, as proposed in section 31.515(a). In cases where the Department has initiated an inspection or audit without giving an AN Facility prior notice, the facility will be expected to make all records required to be maintained by the final ammonium nitrate rule available to inspectors within four hours of receipt of an inspector request to review/inspect/

audit such records, as proposed in section 31.515(b).

Inspections and audits would be conducted by DHS personnel or by other Federal, State, local, or tribal government personnel authorized to perform AN Facility inspections pursuant to this rule. The Department may conduct remote inspections and audits in addition to in-person inspections and audits, as proposed in sections 31.500(b), 31.505(b), and 31.515(c)–(d). The Department welcomes comments and suggestions as to when a remote inspection would be reasonable, cost effective, and of benefit to AN Facilities or the Department.

G. Guidance Materials and Posters

Under Subtitle J, the Department is required to develop and provide to members of the regulated community several types of guidance documents and materials. First, 6 U.S.C. 488a(i)(4)(C) requires the Department to issue to any individual who is denied an AN Registered User Number guidance on the procedures for appealing that denial. Second, 6 U.S.C. 488c(c)(1) requires the Department to make available to owners of AN Facilities guidance on the identification of suspicious ammonium nitrate purchases, transfers, attempted purchases, and attempted transfers, as well as guidance on appropriate actions to be taken by AN Facilities with respect to such suspicious activities. Additionally, 6 U.S.C. 488c(c)(3) requires the Department to make available materials suitable for posting at locations where ammonium nitrate is sold that notify prospective AN Purchasers of Subtitle J's recordkeeping requirements and the penalties for violating those requirements.

As the procedures and requirements that will be detailed in these materials are to a large degree dependent on the final rule for Subtitle J, the Department is still gathering information, input, and data, which it will use to assist in developing these guidance materials and posters. It is the Department's intent to work with the regulated community to determine appropriate content and means of dissemination for these guidance materials and posters. The Department welcomes comments from the public on these matters.

H. Civil Penalties, Civil Penalty Adjudications, and Civil Penalty Appeals (See Sections 31.600–31.735 of the Proposed Rule)

This section discusses proposed requirements for adjudication and appeal procedures for the issuance and assessment of civil penalties by the Department under Subtitle J. An earlier section of this NPRM, section III.B.14, discusses proposed appeal rights and procedures for persons denied AN Registered User Numbers and for persons whose AN Registered User Numbers are revoked under Subtitle J. These two sets of procedures are mutually exclusive; the Department proposes that civil penalty adjudications and appeals would be governed only by the mechanisms described in this section, while registration and revocation appeals would be governed only by the appeals mechanisms described in section III.B of this NPRM.

The reason for this mutual exclusivity is because registration denials and revocations are fundamentally different from imposition of civil penalties under the Department's proposed rule. Under the Department's proposal, individuals or other entities will only be issued civil penalties for violating the rules of the Ammonium Nitrate Security Program. Individuals or other entities will not be issued civil penalties for having their registrations denied or revoked. Adjudication or appeal of civil penalties will thus involve assessment of whether or not individuals or other entities have violated the final Ammonium Nitrate Security Program rules. On the other hand, appeal of denial or revocation of registration numbers will involve review of the completeness and accuracy of registration applications, and review of TSDB vetting results and national security interests if applicable. The adjudication and appeal procedures listed in this section of the NPRM are intended to enable reviews of civil penalties and of alleged regulatory violations, while the appeal procedures listed in section III.B are intended to enable reviews of registration application denials and revocations of registration numbers.

The Department is authorized to assess civil penalties against persons violating the rules promulgated under Subtitle J. *See* 6 U.S.C. 488e(b). In section 31.600, the Department proposes that, upon becoming aware of regulatory violations, the Department would authorize and order civil penalties of up to $50,000 per regulatory violation against violating persons and entities much in the same way as the CFATS rules enable it to authorize and order civil penalties against chemical facilities violating CFATS. Specifically, the Department proposes to issue Orders Assessing Civil Penalty against persons (and, as appropriate, against entities owning or operating AN Facilities) for violating these rules. The Department proposes in section 31.700(a) that subject persons/entities shall have the option of initiating adjudicatory proceedings to challenge the propriety of the Department's determinations. The Department also proposes in section 31.735(a) that subject persons/entities may appeal adverse adjudication decisions. The Department welcomes public comment on these mechanisms, and welcomes suggestions of possible alternatives or modifications to them.

Subtitle J requires the Department to consider a number of factors in issuing and setting the amounts of civil penalties against persons violating Subtitle J and its implementing regulations. *See* 6 U.S.C. 488e(c). The Department proposes to consider the factors listed in section 31.605, among other factors as justice requires, in issuing and setting the amounts of civil penalties. The Department welcomes public comment on additional factors that it should consider in issuing and setting civil penalties, and also welcomes public comment on the size of the civil penalties it should issue for different types of regulatory violations.

Subtitle J also requires the Department to afford each person potentially subject to civil penalties the opportunity to defend himself in an administrative hearing to be held ''in the county, parish, or incorporated city of residence of that person.'' *See* 6 U.S.C. 488e(d). As such, the Department proposes in section 31.725(b) to conduct all hearings and adjudications in the counties, parishes, or incorporated cities of residence of the persons or entities seeking those hearings and adjudications, unless those persons or entities waive this right. The Department believes that it may be more expeditious, from time to time, for the Department and for subject persons to conduct hearings and adjudications elsewhere, or to conduct them via teleconferencing or videoconferencing, and accordingly thinks it economical to all to offer subject persons this option. The Department welcomes public comment on the efficiency of allowing subject persons to waive the statutory right to local hearing and adjudication.

I. Consultation Requirements

6 U.S.C. 488a(g) requires the Department to ''consult with the Secretary of Agriculture, States, and appropriate private sector entities, to ensure that the access of agricultural producers to ammonium nitrate is not unduly burdened.'' Similarly, 6 U.S.C. 488a(b) requires the Department to consult ''with the heads of appropriate Federal departments and agencies (including the Secretary of Agriculture)'' when establishing a threshold

percentage for ammonium nitrate in a substance. Finally, in 6 U.S.C. 488a(i)(4)(B), Congress directed the Department to consult with appropriate stakeholders when developing the process for appealing the denial of an application for an AN Registered User Number.

During the development of this NPRM, the Department has identified relevant points of contact for consultation purposes within numerous Federal, State, and private sector entities. For example, the U.S. Department of Agriculture (USDA) assisted the Department with gaining a better understanding of the potentially affected population, and with understanding how agricultural users acquire and use ammonium nitrate. The Explosives Unit at the FBI provided substantial insight into the detonability of ammonium nitrate and mixtures containing ammonium nitrate. The Office of Enforcement Programs and Services at ATF outlined how ATF regulates ammonium nitrate and ammonium nitrate explosive mixtures as well as how ATF manages the reporting of theft or loss of explosives. The Department also met with State fertilizer control officials from over a dozen States who provided significant insight into how ammonium nitrate is used within their States and how they currently regulate ammonium nitrate. The Department also held listening sessions with numerous industry associations representing members of the likely regulated community, as well as with individual producers, distributors, and users of ammonium nitrate.

Subsequent to the release of this NPRM, the Department will continue to consult with Federal, State, and private sector entities as it develops the final rule. The Department intends to hold meetings, open to the public and to Federal and State government entities, at various locations across the country in order to further consult with ammonium nitrate stakeholders. The Department intends to publish the dates, times, and locations of these public meetings in the **Federal Register**.

J. Delegation of Authority

The Department may enter into cooperative agreements with USDA or any State department of agriculture to carry out certain provisions of Subtitle J. *See* 6 U.S.C. 488c(a)(1). Subtitle J further requires the Department, at the request of a governor of a State, to delegate to that State authority to carry out the administration and enforcement of select portions of Subtitle J, ''if the Secretary [of Homeland Security] determines that the State is capable of satisfactorily carrying out such functions.'' *See* 6 U.S.C. 488c(b)(2). If the Department delegates any functions to a State, ''subject to the availability of appropriations * * * the Secretary shall provide to that State sufficient funds to carry out the delegated functions.'' *See* 6 U.S.C. 488c(b)(3).

In regards to delegation of its authority to individual States, the Department proposes the following process: If a State is interested in performing the administration and enforcement activities required by Subtitle J, the governor of the State would submit a written request to the Department asking for delegation of those authorities and articulating the State's ability to ''satisfactorily carry out such functions.'' *See* 6 U.S.C. 488c(b)(2). Upon receipt of the request, the Department would evaluate whether the State is ''capable of satisfactorily carrying out such functions'' and, upon completion of the evaluation, would provide the State with a written response informing it of the Department's determination. In order to make a fair evaluation, the Department is likely to request information from the State and consult with the State before a final determination is made.

IV. Regulatory Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866, as supplemented by Executive Order 13563, Regulatory Planning and Review (58 FR 51735, October 4, 1993; 76 FR 18134, January 18, 2011), directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires agencies to consider the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to assess the effect of regulatory changes on foreign commerce of the United States. In developing U.S. standards, the Trade Agreements Act requires agencies to consider international trade standards where appropriate, as the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

A. Executive Order 12866 and Executive Order 13563: Regulatory Planning and Review

This proposed rule is an economically significant regulatory action under Executive Order 12866 as supplemented by Executive Order 13563, because it could result in the expenditure of over $100 million in any one year. Accordingly, this proposed rule has been reviewed by the Office of Management and Budget (OMB). The OMB Circular A–4 Accounting statement is included in the separate Regulatory Assessment.

A Regulatory Assessment, which more thoroughly explains the assumptions used to generate the estimated costs and benefits of this proposed rule, is available in the docket as indicated under the **ADDRESSES** section. Interested persons are invited to provide comment on all aspects of the Regulatory Assessment. Comments that will provide the most assistance to the Department with the rulemaking include the economic impact (both long-term and short-term, quantifiable and qualitative) of the implementation of Subtitle J; the monetary and other costs anticipated to be incurred by AN Facility Representatives, AN Sellers, AN Purchasers, and anyone else potentially impacted by Subtitle J, any distributional effects on U.S. citizens; and the security benefits of the rulemaking.

Comments containing trade secrets, confidential commercial or financial information, CVI, or SSI should be appropriately marked and submitted per the directions in section I of this NPRM (Public Participation) above.

1. Cost Impacts

DHS estimates the number of entities that purchase ammonium nitrate to range from 64,950 to 106,200. These entities include farms, fertilizer mixers, farm supply wholesalers and co-ops, golf courses, landscaping services, explosives distributors, mines, retail garden centers, and lab supply wholesalers. The Department estimates between 2,486 and 6,236 entities sell ammonium nitrate, many of which also purchase ammonium nitrate as well. Entities that sell ammonium nitrate include ammonium nitrate fertilizer and explosive manufacturers, fertilizer mixers, farm supply wholesalers and co-ops, retail garden centers, explosives distributors, fertilizer applicator

services, and lab supply wholesalers. Individuals or firms that provide transportation services within the distribution chain may be categorized as sellers, agents, or facilities depending upon their business relationship with the other parties to the transaction. The total number of potentially regulated farms and other businesses ranges from 64,986 to 106,236 (including overlap between the categories).

The cost of the Ammonium Nitrate Security Program ranges from $300 million to $1.041 billion over 10 years at a 7% discount rate. The primary estimate is the mean, which is $670.6 million. For comparison, at a 3% discount rate, the cost of the program ranges from $364.2 million to $1.3 billion with a primary (mean) estimate of $814 million. The average annualized cost for the program ranges from $43 million to $148 million (with a mean of $96 million), also employing a 7% discount rate. The largest cost component of the proposed rule is related to the point of sale. The point of sale activities account for approximately 55% to 80% of the total program cost. This is followed by registration activities, recordkeeping, inspections/audits, and reporting theft/loss.

2. Benefits of the Ammonium Nitrate Security Program

This rule will help secure the nation's supply of ammonium nitrate. According to a U.S. Department of Justice report, ''[t]he April 19, 1995, bombing of the Alfred P. Murrah Federal Building (Murrah Building) in Oklahoma City sent shock waves throughout America. The bombing took its toll in human life and property damage and changed the community's and the Nation's general sense of safety and security. The explosion rocked downtown Oklahoma City, reduced the north face of the Murrah Building to rubble, and dealt extensive damage to each of the nine floors as they collapsed into the center, pancaking one on top of the other. When the dust cleared, one-third of the building lay in ruins. The force of the blast damaged 324 surrounding buildings, overturned automobiles, touched off car fires, and blew out windows and doors in a 50-block area. News reports indicated the explosion was felt 55 miles from the site and registered 6.0 on the Richter scale.'' *See* ''Responding to Terrorism Victims: Oklahoma City and Beyond,'' U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, October 2000, available at *http://www.ojp.usdoj.gov/ovc/publications/infores/respterrorism/executive.html* and *http://www.ojp.usdoj.gov/ovc/publications/infores/respterrorism/chap1.html.* The attack, which occurred 16 years ago, killed 168 people (167 individuals were killed by the explosion and 1 additional death of an emergency worker occurred during the rescue and recovery operation) and an additional 592 people suffered non-fatal injuries. *See* ''Physical Injuries and Fatalities Resulting From the Oklahoma City Bombing.'' JAMA, August 7, 1996 Sue Mallonee, RN, MPH; Sheryll Shariat, MPH; Gail Stennies, MD, MPH; Rick Waxweiler, PhD; David Hogan, DO; Fred Jordan, MD, pp 382–387available at: *http://jama.ama-assn.org/cgi/reprint/276/5/382; http://jama.ama-assn.org/cgi/content/abstract/276/5/382* (estimates of injuries differ by source; DHS used the detailed JAMA article as it was based on survey and interview data and has thorough documentation).

There are several key benefits of the Ammonium Nitrate Security Program proposed rule:

- The Ammonium Nitrate Security Program will standardize and build upon successful industry ''know your customer'' initiatives and state regulations to prevent the misappropriation of ammonium nitrate.
- The Ammonium Nitrate Security Program will provide timely, accurate vetting of persons wishing to possess and transfer ammonium nitrate. By requiring individuals to be vetted against the TSDB, known bad actors may be stopped from legally purchasing ammonium nitrate.
- The Ammonium Nitrate Security Program will allow AN Sellers to identify non-authorized persons and requires them to deny sale of ammonium nitrate to these persons. By complying with the point of sale requirements to verify the accuracy and currency of a potential AN Purchaser's AN Registered User Number and an inspection of his/her photo identification document, AN Sellers will have the knowledge to allow or deny sale of ammonium nitrate.
- The Ammonium Nitrate Security Program will eliminate gaps in Federal oversight of ammonium nitrate supplies used in explosives manufacturing.

To better inform the comparison of the costs of implementing the ammonium nitrate program in the proposed rule with the benefits to homeland security it will afford due to reduced risk of successful terror attack involving ammonium nitrate, DHS performed a break-even analysis. In this break-even analysis, DHS compared the annualized costs of the proposed rule to the expected benefits of preventing an ammonium nitrate based terrorist attack, such as the attack on the Murrah federal building. In order to estimate the impact of this attack in dollar terms, DHS must assume a value per statistical life (VSL). The Department emphasizes this VSL is not an estimate of what a particular life may be worth, but is only an estimate what one would be willing to pay to receive a reduction in mortality risk. The Department is assuming a VSL of $6 million, which is equivalent to saying someone is willing to pay $6 to receive a one-in-a-million reduction in the risk of death or $60 to receive a one-in-a-one-hundred-thousand reduction in the risk of death.

Applying the $6 million VSL to the 168 deaths from the Murrah attack plus the cost of other expenditures that are directly related to the attack (such as the cost of replacing the Murrah Building), DHS estimates the cost to society of the Murrah attack to be approximately of $1.35 billion (2010 dollars). As this proposed rule is expected to cost society approximately $95.5 million annually, this proposed rule would be cost effective if it prevented one terrorist attack similar to the Murrah building attack every 14.1 years ($1.35 billion attack cost/$95.5 million annual rulemaking cost). See the Regulatory Assessment in the public docket for more information on this break-even analysis.

In addition to reducing the possibility of an ammonium nitrate-based terrorist attack, promulgating this rulemaking provides the benefit of allowing DHS to comply with the law. Subtitle J states the ''Secretary shall regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility …to prevent the misappropriation or use of ammonium nitrate in an act of terrorism.'' Section II.A of this preamble provides a more detailed background discussion of the regulatory requirements expressly contained in Subtitle J, such as the registration requirement for certain ammonium nitrate sellers and purchasers. DHS believes this rulemaking allows the Department to comply with the regulatory requirements of Subtitle J.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the RFA requires agencies to consider the potential impacts of their rules on small entities. The RFA covers a wide

range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Although DHS does not believe the proposed rule will have a significant economic impact on a substantial number of small entities, the agency has prepared an Initial Regulatory Flexibility Analysis (IRFA) for public review and comment. DHS requests comments on this IRFA and the potential impacts of the proposed rule on small entities. Below is a summary of the IRFA.

1. Reasons for and Objectives of the Proposed Rule

Reason for the Proposed Rule. Section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act amends the Homeland Security Act of 2002 and provides DHS with the authority to ''regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility * * * to prevent the misappropriation or use of ammonium nitrate in an act of terrorism.'' For additional information on the security hazards presented by the use of ammonium nitrate, see sections II.D.1 and 2 of this preamble.

Objective of the Proposed Rule. This proposed rule aims to prohibit a known or suspected terrorist from purchasing or legally acquiring ammonium nitrate from an AN Facility. Additionally, only individuals favorably vetted by the Department will be able to legally acquire ammonium nitrate above the threshold level proposed by this rule.

2. Affected Small Business Population and Estimated Impact of Compliance

At this time, DHS's preliminary estimate of the number of establishments that either sell, purchase, or sell and purchase ammonium nitrate that will be covered by the Ammonium Nitrate Security Program rules range from 64,986 to 106,236 facilities. This estimate is DHS's best estimate based on listening sessions with industry representatives and plant food control officials, consultation with other Federal agencies and departments (*e.g.,* USDA), and research across available information provided by industry and governmental sources. During the ANPRM, DHS did not receive any information on small nonprofits or small governmental jurisdictions that might be directly regulated by this rule. However, some of the entity types identified in the analysis of purchasers are similar to activities that could be conducted by small nonprofits or small governmental jurisdictions. DHS believes impacts on small nonprofits or small governmental jurisdictions would be similar as any other purchaser in this analysis. DHS invites comments from any small nonprofit or small governmental jurisdiction that believes it is being directly regulated by this rule. After AN Sellers and AN Purchasers register with DHS there will be a better understanding of how many and which specific AN Facilities will be subject to the requirements under the Ammonium Nitrate Security Program. Consequently, without the benefit of having the AN Registered User Number results, it is very difficult to know which AN Facilities will have to undergo the burden of verifying AN Registered User Numbers, and maintaining records of transactions involving ammonium nitrate. In addition, the Department has offered some degree of flexibility when choosing the method of verifying AN Registered User Numbers and maintaining records. DHS expects that AN Facilities will take full advantage of this flexibility in order to minimize the cost of this proposed rule to their operations.

3. Number of Small Entities That Purchase Ammonium Nitrate

The Small Business Administration (SBA) classifies farms as a small business if it has receipts less than $750,000. The USDA Census of Agriculture provides data on the number of farms by economic class based on the market value of agricultural products sold (excluding government payments). The next table shows that 94.5% of farms had receipts of $0.5 million or less; 97.4% of farms had receipts less than $1.0 million. Thus, it is clear that the majority of farms are small entities. Comments are requested concerning the provided information.

NUMBER OF U.S. FARMS BY THE MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD

[2007]

Market value of agricultural products sold ($)	Number of farms	Percent of total
Less than $1000	499,880	22.7
$1000–$2,499	270,712	12.3
$2500–$5,000	246,309	11.2
$5,000–$9,999	254,834	11.6
$10,000–$24,999	274,274	12.4
$25,000–49,999	163,500	7.4
$50,000–$99,999	129,124	5.9
$100,000–$249,000	149,049	6.8
$250,000–$499,999	96,251	4.4
$500,000–$999,999	63,567	2.9
More than $1,000,000	57,292	2.6
Total Farms	2,204,792	100.0

Source: 2007 Census of Agriculture, USDA (Table 3—page 10).

The next two tables show the primary North American Industrial Classification System (NAICS) codes, descriptions and SBA definitions for small entities that purchase ammonium nitrate. This comparison shows that the majority of businesses likely to purchase ammonium nitrate are small entities.

PRIMARY NAICS CODES, DESCRIPTIONS AND DEFINITIONS FOR SMALL ENTITIES THAT MAY PURCHASE AMMONIUM NITRATE

[Employee size]*

NAICS	Description	Establishments by employee size						
		0–4	5–9	10–19	20–99	100–499	(Subtotal) < 499	500+
2121	Coal Mining	194	96	100	233	149	772	375
	% of total	17%	8%	9%	20%	13%	67%	33%
2122	Metal Mining	131	39	18	26	21	235	72
	% of total	43%	13%	6%	8%	7%	77%	23%
2123	Nonmetallic Mineral Mining and Quarrying.	1,434	666	603	877	501	4,081	1,743
	% of total	25%	11%	10%	15%	9%	70%	30%
325314	Fertilizer (Mixing Only) Manufacturing	111	64	56	89	62	382	94
	% of total	23%	13%	12%	19%	13%	80%	20%
42491	Farm Supplies Merchant Wholesalers	2,473	983	673	948	765	5,842	1,901
	% of total	32%	13%	9%	12%	10%	76%	25%
42469	Other Chemical & Allied Products Merchant Wholesalers.	3,352	1,155	846	1,082	648	7,083	2,405
	% of total	35%	12%	9%	11%	7%	74%	25%

*Totals may be affected by rounding.

PRIMARY NAICS CODES, DESCRIPTIONS AND DEFINITIONS FOR SMALL ENTITIES THAT MAY PURCHASE AMMONIUM NITRATE

[Sales size]*

NAICS	Description	Establishments by sales size						
		<$0.1 mill	$.1–0.5 mill	$0.5–1 mill	$1–5 mill	$5–10 mill	(Subtotal) < $10 mill	> $10 mill
213113	Support services for Coal Mining	47	98	38	101	16	300	46
	% of total	14%	28%	11%	29%	5%	87%	13%
213114	Support services for Metal Mining	19	26	14	20	.....	79	104
	% of total	10%	14%	8%	11%	0%	43%	57%
213115	Support services for Nonmetallic Mining	24	47	17	40	8	136	15
	% of total	16%	31%	11%	26%	5%	89%	10%
44422	Nursery, Garden Center, and Farm Supply Stores.	1,872	5,004	2,675	3,941	830	14,322	3,461
	% of total	11%	28%	15%	22%	5%	81%	20%
56173	Landscaping Services	23,993	36,446	6,935	5,095	490	72,959	1,249
	% of total	32%	49%	9%	7%	1%	98%	1%
71391	Golf Courses & Country Clubs	1,172	3,802	2,041	3,333	588	10,936	906
	% of total	10%	32%	17%	28%	5%	92%	7%

*Totals may be affected by rounding.

4. Number of Small Entities That Sell Ammonium Nitrate

In addition to regulating AN Purchasers, the proposed rule places additional burdens on entities that sell ammonium nitrate. These additional burdens include registration for AN Registered User Number, verifying AN Purchasers' AN Registered User Number and photo ID at the point of sale, maintaining records of point of sale transactions for two years and reporting theft and loss of AN. AN Facilities that are in the middle of the supply chain from manufacturer to end-use consumer both sell and purchase ammonium nitrate. The primary NAICS codes, descriptions, and definitions (both employee size and revenues) for small entities that sell ammonium nitrate are shown in the next two tables. The SBA classifies the majority of these AN Facilities as small entities.

PRIMARY NAICS CODES, DESCRIPTIONS AND DEFINITIONS FOR SMALL ENTITIES THAT MAY SELL AMMONIUM NITRATE

[Employee size]*

NAICS	Description	Establishments by employee size						
		0–4	5–9	10–19	20–99	100–499	(Subtotal) < 499	500+
325311	Nitrogenous Fertilizer Manufacturing	46	19	23	15	11	114	31
	% of total	32%	13%	16%	10%	8%	79%	21%
325314	Fertilizer (Mixing Only) Manufacturing	111	64	56	89	62	382	94
	% of total	23%	13%	12%	19%	13%	80%	20%
32592	Explosives Manufacturing	8	4	10	16	13	51	31

PRIMARY NAICS CODES, DESCRIPTIONS AND DEFINITIONS FOR SMALL ENTITIES THAT MAY SELL AMMONIUM NITRATE—Continued

[Employee size]*

NAICS	Description	Establishments by employee size						
		0–4	5–9	10–19	20–99	100–499	(Subtotal) < 499	500+
	% of total	10%	5%	12%	20%	16%	63%	38%
42291	Farm Supplies Merchant Wholesalers	2,473	983	673	948	765	5,842	1,901
	% of total	32%	13%	9%	12%	10%	76%	25%
42269	Other Chemical and Allied Products Merchant Wholesalers.	3,352	1,155	846	1,082	648	7,083	2,405
	% of total	35%	12%	9%	11%	7%	74%	25%

*Totals may be affected by rounding.

PRIMARY NAICS CODES, DESCRIPTIONS AND DEFINITIONS FOR SMALL ENTITIES THAT MAY SELL AMMONIUM NITRATE

[Sales size]*

NAICS	Description	Establishments by sales size						> $10 mill
		< $0.1 mill	$.1–0.5 mill	$0.5–1 mill	$1.5 mill	$5–10 mill	(subtotal) < $10 mill	
115112	Soil Preparation, Planting, and Cultivating.	509	992	413	395	30	2,339	86
	% of total	21%	41%	18%	16%	1%	96%	4%
44422	Nursery, Garden Center, and Farm Supply Stores.	1,872	5,004	2,675	3,941	830	14,322	3,461
	% of total	11%	28%	15%	22%	5%	81%	20%

*Totals may be affected by rounding.

5. Alternatives Considered

The Department considered several alternatives when developing the Ammonium Nitrate Security Program proposed rule. The alternatives considered were: (a) Register individuals applying for an AN Registered User Number using a paper application (via facsimile or the U.S. mail) rather than through in person application at a local Cooperative Extension office or only through a web-based portal; (b) verify AN Purchasers through both an Internet based verification portal and call center rather than only a verification portal or call center; (c) communicate with applicants for an AN Registered User Number through U.S. Mail rather than only through e-mail or a secure web-based portal; (d) establish a specific capability within the Department to receive, process, and respond to reports of theft or loss rather than leverage a similar capability which already exists with the ATF; (e) require AN Facilities to maintain records electronically in a central database provided by the Department rather than providing flexibility to the AN Facility to maintain their own records either in paper or electronically; (f) require agents to register with the Department prior to the sale or transfer of ammonium nitrate involving an agent rather than allow oral confirmation of the agent with the AN Purchaser on whose behalf the agent is working; and (g) exempt explosives from this regulation rather than not exempting them. Each of these alternatives is discussed below.

a. Registration

The Department considered using one or more of three potential approaches for AN Seller and AN Purchaser registration: paper applications submitted via facsimile or U.S. Mail; electronic applications via a web-based portal; or telephone application for a limited number of applicants. The Department is proposing the use of a web-based portal—the ''AN User Registration Portal''—as the sole means for registering to be an AN Purchaser or AN Seller.

1. Registration through Facsimile or U.S. Mail

Paper registration via facsimile or U.S. Mail would require potential applicants to obtain and fill out an application form and fax it or mail it to the Department. The Department would then process the application and communicate the results back to the potential applicant via facsimile or U.S. Mail.

Registration through facsimile or U.S. Mail would have costs to both the industry and the Department. For the industry, each prospective AN Seller or AN Purchaser applying for an AN Registered User Number would have to spend approximately 45 minutes reading about the rule and procedures for registration before completing the registration application. If the application is paper-based, DHS assumes it will take each applicant about 15 minutes to complete a paper application, fax or mail it to the Department, and file it for his or her records. For the Department, supporting paper submission of application materials via facsimile or U.S. Mail would require the hiring of staff to manually extract information from the submitted application form for performance of the TSDB check and submission into a registered user database maintained by the Department. The paper application process was not pursued or developed, as the Department believes that it would result in unacceptably lengthy application processing times, and unacceptable delays between submission of applications and receipt of AN Registered User Numbers.

2. Registration Through Local Cooperative Extension Office

During the ANPRM DHS received the suggestion to consider the USDA extension offices as an application

method. The USDA provided explanations why this was not feasible.

3. Registration Through the AN User Registration Portal

Through a Department developed website, potential applicants could apply for an AN Registered User Number online. With the widespread availability of the Internet, applicants could apply from home, a public library, or place or employment, for instance. Further, nothing in the proposed rule would prohibit an AN Facility from providing an Internet access point to potential applicants for use when applying for AN Registered User Numbers. Potential applicants would go to the Department's website and access the AN User Registration Portal. There, potential applicants would apply online for an AN Registered User Number and submit their application directly to the Department. The Department would receive the information, process it, and communicate back to the applicant via e-mail.

Online registration through a Department developed, operated, and maintained website would have costs to both the industry and the Department. Each prospective AN Seller or AN Purchaser applying for an AN Registration User Number will spend approximately 45 minutes reading about the rule and procedures for registration before completing the registration application. If the application is online, the Department assumes it will take the applicant approximately 15 minutes to find the website, enter information, submit the information to the Department, and print and file a copy for his or her records. Both the individual applicant and government costs are developed in the relevant sections of the evaluation The Department intends to leverage the Chemical Security Assessment Tool developed and deployed in support of CFATS, thus significantly lowering both the initial development costs and the annual operating and maintenance costs.

The Department is proposing that registration be done through an online web portal. *See* section III.B.1 of this preamble. While not every potential applicant may have personal access to the Internet, the Internet is widely available, and the Department believes that there are significant benefits to using an online approach. The benefits to both the applicant and the Department of an online approach include: (1) Substantially quicker response from the Department, thereby minimizing the time during which the applicant would not be able to purchase or sell ammonium nitrate; (2) the ability for an applicant or registered user to access, view, update, and manage their personally identifiable information; (3) and greater control over managing their participation in the Ammonium Nitrate Security Program, such as ease in renewing their AN Registered User Number. The Department proposes that neither paper registration applications nor in person applications at local Cooperative Extension offices be offered.

Registration Via a Telephone Application Process

The applicant would contact the AN Helpdesk and ask to register over the phone. The Helpdesk operator would collect all the information necessary to complete an application for an AN Registered User Number. The IT system would then route the application as if it were an application through the web portal. The evaluation of the vetting against the TSDB would be the same.

Once a decision had been made as to whether or not to approve or deny an application, the system would identify the response to be mailed to the applicant. The system would route the information to a vendor to process the letter. The vendor would print and mail the letter. The letter would require tracking, signature, certification (*i.e.,* verification of identify), and next day delivery. DHS would also require evidence of delivery from the vendor. These are required to ensure delivery and receipt of the AN Registered User Number to the correct individual.

DHS is not recommending the telephone option but invites public comment on the concept. The following tables provide information on the costs that vary between the recommended web-portal approach and the phone approach.

DIFFERENCES BETWEEN ALTERNATIVES COSTS

[$ millions, 10-year total costs, 7 percent discount]

	Web-portal	Phone option	Difference
Registration Costs	71.3	20.3	51.0
Federal Costs	55.3	81.5	−26.2
All Other Costs	544.0	540.7	3.3
Total Costs	670.6	642.5	28.1

b. Verification

The Department considered three potential approaches to verify a prospective AN Purchaser; establishing a web-based portal (*i.e.,* Purchaser Verification Portal), establishing a call center, and establishing both capabilities. The Department is proposing to establish both a web-based portal and call center.

1. Purchaser Verification Portal

Verifying AN Purchaser status through a web-based portal will have costs to both industry and the Department. The Department will bear the cost of developing and maintaining the verification portal and related guidance on its use and proper verification processes. The cost to industry of this activity is having a computer and access to the Internet. Beyond that, cost to the industry is the incremental time spent during an ammonium nitrate transaction to verify the identity and AN Registered User Number of the prospective AN Purchaser. Accordingly, the overall cost would depend on the number of ammonium nitrate transactions that occur and the time it takes to perform a simple identity check and enter basic AN Purchaser information into the web-portal. Based upon the detailed data in the evaluation, the following table summarizes the average costs per transaction.

POINT OF SALE AVERAGE COST SUMMARY*

	Low total estimate	High total estimate	Mean
Total POS Annual Costs ($)	23,886,565	120,516,567	72,201,566
Purchaser POS Costs ($)	3,488,523	18,112,934	10,800,728
Seller POS Costs ($)	20,398,042	102,403,633	61,400,837
Transactions	5,486,000	29,340,000	17,413,000
Sellers	2,486	6,236	4,361
Purchasers	64,950	106,200	85,575
Transactions/Seller/Week	42.4	90.5	66.5
Transactions/Purchaser/Week	1.6	5.3	3.5
Seller Cost/Transaction ($)	3.7	3.5	3.5
Purchaser Cost/Transaction ($)	0.64	0.62	0.62

* Data is for all entities and comes from the detailed evaluation, particularly Tables 9, 10, 26–29, 35–36.

2. Purchaser Verification Call Center

The Department also considered a Purchaser Verification Call Center. Under this approach, AN Sellers would use a telephone to call a toll-free phone number established by the Department where they would either talk to a person or be led through a series of telephone tree menus. During the phone call, the AN Seller would be expected to provide information about the AN Purchaser. The operator or automated telephone system would enter the information provided into the Department's Registered User database system, wait for electronic confirmation, and then provide verbal confirmation to the caller along with a confirmation number for that specific transaction.

Verifying AN Purchaser status through a call center will have costs to both industry and the Department. The burden to the industry for the call center option rests upon having a telephone and the time spent relaying the relevant AN Purchaser information to the call center. The cost to the Department is the establishment of the call center and potentially employing staff to standby and field calls regarding AN purchases.

3. Purchaser Verification Portal and Call Center

The Department proposes to establish both a Purchaser Verification Portal and a Purchaser Verification Call Center. *See* section III.C.13. This approach is identical to the Purchaser Verification Portal described above, integrated with the Purchaser Verification Call Center capability. This approach presumably would be the cheapest for the regulated community as each AN Facility likely would choose to employ the most cost-effective means of verification; however, it would be the most costly of the alternatives for the Department to establish and operate as it would bear the costs associated with the development and maintenance of both a web verification portal and call center.

When creating a manner in which AN Sellers can verify the required information on a potential ammonium nitrate purchase by an AN Purchaser, the Department found both advantages and disadvantages to each option considered. A call center may be preferable to a web portal, as presumably all AN Facilities have telephones while not all AN Facilities have computers with Internet access, particularly at the point of sale. However, there are some potential disadvantages. For instance, the call center approach would take more time per transaction than the web portal approach, and it would be significantly more costly for the Department to establish and operate a call center. The advantage of this alternative is that all AN Facilities would be accommodated—those with telephone access only and those with both telephone and Internet access who find the verification web portal option more efficient. As a result, the Department proposes to offer both online and call center options despite the higher costs to the Department.

c. Communication With Applicants

The Department must communicate with applicants throughout the registration process. The Department considered two alternatives to communicating with applicants: (1) communication by U.S. Mail, and (2) communication by electronic means. The Department proposes to communicate with applicants by electronic means.

1. U.S. Mail

The U.S. Mail could act as the communication medium between the Department and the regulated community. If the U.S. Mail were chosen as the communication mechanism, the Ammonium Nitrate Security Program would be paper-based. While there would be some minimal cost to the industry (*e.g.,* postage), the time to complete paperwork would be equivalent to the submission of information electronically. The costs to the Department, however, would be more substantial. The Department would have to hire or devote staff to process incoming correspondence.

2. Electronic Means

The other option for communication could be by electronic means. Program communication would occur through e-mail and secure web portals. The cost to the industry can be broken down to computer and Internet access. The cost to the Department hinges on developing web portals and databases to securely store information.

The Department assumes that most applicants have Internet access with one exception. Based upon information from the USDA, approximately 60% of farms have Internet access. Thus, DHS assumes that in the agricultural sector, approximately 60% of farms have computers with Internet access. The Department therefore estimated that 40% of these individuals will have to travel a short distance to public library, or other location where access to the Internet is available to apply for an AN Registered User Number. Further, DHS assumes that for applicants without Internet access, two trips will be required; one to complete the AN Registered User Number application, and a second trip after 72 hours to retrieve the e-mail containing the AN User Registration Number. The Department has assumed farmers without Internet access will make two trips. The Department assumes that the round trip distance is 50 miles per trip and has used the IRS mileage rate of $0.55 per mile. DHS assumes the total extra time for each trip will average approximately one hour each way. Each trip will include an additional hour for the Internet access and registration. Multiplying 50 miles times two trips times $0.55 per mile totals $55 per individual for the two trips associated

with applying for and receiving an AN Registered User Number. Additionally, DHS included approximately $1.9 million for farmers who attempt to make a purchase without knowing about the regulation and must then make one extra trip. These calculations are detailed in Tables 11 and 12 in Section 7 of the full evaluation. Because of the minimal time and effort it takes to apply for and receive an AN Registered User Number, the Department believes this approach to be a cost-effective way to prevent misappropriation of ammonium nitrate.

The Department considered using the U.S. Mail as the primary medium for communication; however, the Department ultimately rejected this approach due to the additional time it would take to notify applicants of their AN Registered User Number. The Department also cited the significant availability of the Internet. Therefore, the Department is proposing to use electronic means as the primary medium for communication. Additionally, the Department believes that electronic communication is more secure and faster than U.S. Mail.

d. Reporting Theft or Loss

The Department considered two alternatives pursuant to Subtitle J, which requires an AN Facility Representative who has knowledge of theft or unexplained loss of ammonium nitrate to report such theft or loss to Federal law enforcement authorities within 24 hours of the time at which knowledge of theft or loss is acquired. The Department considered requiring an AN Facility Representative to report to either the Department or ATF. The Department proposes to require reporting of theft/loss to ATF.

Under either option, there is a burden to the industry. The cost to industry of this activity will be the time to gather details and report the theft or loss of AN. Because of the seriousness of theft or loss of AN, the total time to report a theft or loss is assumed to include two hours each for an inventory manager and sales person, plus one hour for the general manager. This includes the time for the reporter to organize useful details for law enforcement and conduct a brief investigation. There will likely be additional time for a necessary follow-up investigation. Strictly for purposes of this analysis, the Department assumes that two percent of AN Facilities and AN Purchasers will report loss or theft once per year. Based on these assumptions, there will be 88 reports of theft or loss annually, at a total annual cost to industry of $13,350.

1. ATF Reporting

One of the many responsibilities of ATF is regulating the use of explosives. Because pure ammonium nitrate does not fall within the scope of the statutory definition of ''explosives'' set forth at 18 U.S.C. 841(d), it is not subject to ATF's controls on importation, manufacture, distribution or storage; however, ammonium nitrate explosive mixtures and ANFO are included in ATF's List of Explosive Materials. ATF has an existing program for reporting the theft or loss of explosives. Individuals that discover the theft or unexplained loss of ammonium nitrate would contact ATF by phone and facsimile and provide the pertinent information. The costs to the industry for reporting to ATF the theft or unexplained loss of ammonium nitrate would be minimal. The costs to the Department would be minimal as well, unless DHS funded ATF efforts.

2. DHS Reporting

Similar to ATF's method for reporting theft or loss of explosives, individuals upon discovering the theft or unexplained loss of ammonium nitrate would contact DHS. The costs to the industry for reporting the theft or unexplained loss of ammonium nitrate to DHS would be minimal. The costs to the Department would be greater than when compared to the ATF reporting requirement. DHS would be required to create and establish the theft/loss reporting policies, procedures, and infrastructure.

The Department is proposing to require reporting of theft/loss to ATF. *See* section III.E of this preamble. ATF already possesses the unique experience in collecting and responding to the theft/loss of explosive related materials. Additionally, DHS wishes to avoid duplicative efforts at the Federal level.

e. Recordkeeping

The Department considered two options to maintain records: (1) Mandatory use of a central electronic database, and (2) the flexibility to maintain records in paper format or in electronic format. The Department proposes allowing AN Facilities to select the method of records storage for themselves. *See* section III.F of this preamble.

The Department selected this alternative because the burden to submit and maintain electronic records in a central database would increase the burden on the industry without measurable benefit to the industry. The benefit would be limited to the confidence an AN Facility would have, that if it maintained its records in a central database, it would meet Department recordkeeping requirements.

The costs to industry associated with this alternative are the costs of the time spent during each transaction collecting and recording the information required under the regulations, the costs of the time spent on ongoing recordkeeping activities throughout the year, and any capital investment costs an AN Facility incurs in acquiring equipment to facilitate the safe storage of the AN transaction records.

f. Agents

The Department considered three options to minimize the likelihood that agents are used to circumvent the intentions of Subtitle J. Specifically, the Department believes it is imperative for AN Sellers to ensure that an agent is acting at the direction of a registered AN Purchaser before the AN Seller transfers possession of ammonium nitrate to that agent. To accomplish this, the Department is considering the following alternatives:

1. Requiring AN Purchasers to submit the names of their agents to DHS via the AN User Registration Portal, and requiring the AN Seller to confirm with DHS, prior to transferring possession of the ammonium nitrate, that the prospective AN Purchaser has submitted the name of the agent to DHS;

2. Requiring the AN Seller to orally confirm with the prospective AN Purchaser prior to each sale that the agent is acting on behalf of the AN Purchaser;

3. A combination of the first two options, whereby an AN Seller first should check with DHS to see if the prospective AN Purchaser has submitted the name of the agent to DHS and, if not, then the AN Seller must orally confirm with the prospective AN Purchaser that the agent is acting on his/her behalf. DHS is proposing this third approach.

Under the first approach, each AN Purchaser would be required to provide to DHS the names of any agents that might act on his/her behalf at the point of sale. The AN purchaser would submit names of agents to DHS via the AN User Registration Portal. An AN Purchaser could submit an agent's name when he/she applies for an AN Registered User Number or at any other time prior to conducting a purchase involving that agent. Then, prior to transferring possession of ammonium nitrate to an agent, an AN Seller would need to verify with the Department that the prospective AN Purchaser has designated the agent as an approved agent to represent the AN Purchaser at

the point of sale. This verification would occur through the same mechanism that is used for the other prospective AN Purchaser verification activities (*i.e.,* the Purchaser Verification Portal or the Purchaser Verification Call Center). The agent's information provided to the Department by AN Purchasers and AN Sellers would not be vetted against the TSDB nor otherwise checked by the Department; rather, it would simply be maintained in the AN Registered User Database as a data field linked to the AN Purchaser for use in the agent verification process.

Under the second approach, the Department would require the AN Seller to verify with the prospective AN Purchaser that the agent is actually acting on behalf of the prospective AN Purchaser for each specific transaction. Much like the other verification activities, this could occur at the time the prospective AN Purchaser places the order, when the agent arrives to take possession of ammonium nitrate, or any other time, so long as it occurs prior to the AN Seller transferring possession of ammonium nitrate to the prospective AN Purchaser's agent. If this approach were adopted, the Department would propose requiring this confirmation to occur for each transaction/occurrence in which an agent is taking possession of ammonium nitrate; a blanket verification of an agent by an AN Purchaser would not be acceptable. Additionally, as an e-mail or letter can be easily forged, under this approach the Department would require that the AN Seller must receive this verification orally (*e.g.,* in person; telephonically) from the prospective AN Purchaser.

The third approach—the option the Department is proposing in this NPRM—is a combination of the first two approaches. Specifically, AN Purchasers would be expected to provide the Department with the names of their agent(s), and an AN Seller would be expected to verify either through the Purchaser Verification Portal or Purchaser Verification Call Center that the agent information has been provided by the AN Purchaser to the Department. As opposed to the first approach, under which a sale cannot occur unless the agent's name has been provided to the Department by the prospective AN Purchaser, under this third option the AN Seller would be allowed to complete the sale or transfer after either (1) verifying the agent has been designated by the prospective AN Purchaser in the Purchaser Verification Portal or Purchaser Verification Call Center, or (2) orally confirming with the prospective AN Purchaser that the agent is acting on the prospective AN Purchaser's behalf for this individual sale. The Department expects that in the majority of cases this oral confirmation would occur telephonically. This third option has the benefit of minimizing the point of sale impact of the agent verification process, while allowing a means for a sale or transfer to be completed even if a prospective AN Purchaser forgets or is otherwise unable to provide the Department with the agent's name prior to using the agent at the point of sale. For these reasons, this third approach is the option proposed by the Department.

g. Exemption of Explosives Regulated by ATF

Pursuant to Subtitle J, the Department has the discretion to exempt from regulation persons producing, selling, or purchasing ammonium nitrate exclusively for use in the production of explosives under a license or permit issued under the Federal explosives laws, 18 U.S.C. Chapter 40, and associated regulations. ATF is responsible for enforcing Federal explosives laws, and has established regulations for doing so. The Department is proposing to exempt from regulation ammonium nitrate mixtures that are ''explosives'' subject to ATF regulation (*i.e.,* ANFO). The Department also considered two other approaches. The first option is to apply these rules to individuals who purchase, sell, or transfer ammonium nitrate for use in the production of explosives. The other option considered is to entirely exempt from Subtitle J requirements facilities and persons that purchase, sell, or transfer ammonium nitrate solely for use in the production of explosives, as they are already regulated by ATF.

1. Exempt AN Mixtures That Are ''Explosives'' Subject to ATF Regulation

Under this approach, entities and individuals that purchase, sell, or transfer ANFO, but who do not produce ANFO or possess ammonium nitrate for other reasons, would be exempt from all Subtitle J requirements and would be subject solely to ATF regulation. This approach minimizes cost to the industry as well as the Department.

2. Regulate Individuals Who Purchase, Sell, or Transfer AN for the Production of Explosives

Under this approach, such individuals would be subject to regulation by both DHS under Subtitle J and ATF under the Federal explosives laws. By not exempting ammonium nitrate used in explosives, DHS would be treating all individuals who purchase, sell, or transfer ammonium nitrate—whether as part of ANFO mixtures or not—the same. This approach would ensure that there are no gaps in coverage of ammonium nitrate as it moves through the supply chain—ammonium nitrate would be captured under DHS's ammonium nitrate program both before and after being combined with fuel oil to create ANFO, and would be captured under ATF's regulations after being combined with fuel oil to create ANFO. There could potentially be heightened costs to the industry due to potentially duplicative regulation. The costs to the Department would hinge upon a greater number of AN Facilities to regulate.

3. Entirely exempt from Subtitle J requirements facilities and persons that purchase, sell, or transfer ammonium nitrate solely for use in the production of explosives

Under this approach, facilities and persons that purchase, sell, or transfer ammonium nitrate solely for use in the production of explosives would be entirely exempt from Subtitle J requirements, as they are already regulated by ATF. In this model, facilities and persons that are licensed by ATF to mix ammonium nitrate with fuel to create ANFO which do not purchase, sell, or transfer ammonium nitrate for other purposes would not be subject to these regulations. This approach, however, could create a considerable gap in regulatory coverage throughout the ammonium nitrate supply chain, as ATF regulations apply solely to ANFO and not the ammonium nitrate used to create it. The costs to the industry, as well as the Department, would be low because certain individuals and facilities would not fall under the regulation.

The Department proposes to exempt from all Subtitle J requirements entities and individuals that purchase, sell, or transfer ANFO, but who do not produce ANFO or possess ammonium nitrate for other reasons. These entities and individuals are regulated by ATF. This approach avoids duplicative regulation yet it does not create a potential regulatory gap in the ammonium nitrate supply chain.

6. Average Costs per AN Facility

The largest cost driver is activities related to the point of sale. While variation in cost by facility is largely driven by the number of point of sale transactions that each AN Facility conducts, it is helpful to examine the average cost per AN Purchaser and AN Facility.

The average costs per entity that purchases ammonium nitrate are presented in the following tables. Both

the lower and upper bounds of the estimate are provided. In either case, the highest cost will be for farms without Internet access. The cost of compliance to AN Purchasers is the time to apply for an AN Registered User Number with the Department of Homeland Security and additional time during the purchase. This registration cost averages $57 to $700 once every five years. DHS believes for even the smallest farms, other businesses, nonprofits, and small jurisdictions that only purchase ammonium nitrate, this registration cost does not represent a significant economic impact. DHS invites comments on this impact, particularly impacts related to the point of sale costs.

AVERAGE COST PER ENTITY THAT PURCHASES AMMONIUM NITRATE—LOW POPULATION/LOW TRANSACTIONS ESTIMATE *

	Purchaser registration ($)	Appeals ($)	Purchase opportunity cost ($)	Total purchaser cost ($)	Number of entities	Average cost per entity ($)
Farms with internet access	2,079,500	28,100	1,674,500	3,782,100	30,000	126
Farms w/o internet access	12,998,000	18,700	1,116,300	14,133,000	20,000	707
Golf courses	169,000	3,500	334,900	507,400	6,000	85
Landscaping services	144,000	2,900	251,200	398,100	4,500	88
Blasting services	16,000	200	14000	30,200	300	121
Mines	71,000	1,500	97,700	170,200	1,800	97
Total	15,477,500	54,900	3,488,500	19,020,900	62,500	304

* Totals may not add due to rounding.

AVERAGE COST PER ENTITY THAT PURCHASES AMMONIUM NITRATE—HIGH POPULATION/HIGH TRANSACTIONS ESTIMATE *

	Purchaser registration ($)	Appeals ($)	Purchase opportunity cost ($)	Total purchaser cost ($)	Number of entities	Average cost per entity ($)
Farms with internet access	3,119,300	42,100	8,150,800	11,312,200	45,000	251
Farms w/o internet access	19,497,500	28,100	5,433,900	24,959,500	30,000	832
Golf courses	339,000	6,900	2,173,600	2,519,500	12,000	210
Landscaping services	287,000	5,800	1,630,200	1,923,000	9,000	214
Blasting services	33,000	700	90600	124,300	500	249
Mines	142,000	2,800	634,000	778,800	3,500	223
Total	23,417,800	86,400	18,112,900	41,617,100	100,000	416

* Totals may not add due to rounding.

The average per AN Facility cost to comply with the proposed rule ranges from $6,400 for laboratory suppliers (low population/low transactions scenario) to $23,800 for an explosives distributor (high population/high transactions scenario).

AVERAGE COST PER AN FACILITY—LOW POPULATION/LOW TRANSACTIONS ESTIMATE *

	Reg. activities ($)	Appeals ($)	Point of sale (Web portal) ($)	Record-keeping ($)	Reporting theft/loss ($)	Audits/ inspections ($)	Total seller cost ($)	Number of AN facilities	Average cost ($)
AN fert. manuf.	8,000	0	125,800	43,100	100	2,700	179,700	0	6,900
AN expl. manuf.	3,000	0	50,800	17,400	0	1,100	72,400	0	7,200
Fertilizer mixers	83,000	1,700	1,935,500	663,200	1,100	41,500	2,726,000	400	6,800
Explosives dist.	102,000	2,100	5,494,500	834,200	1,500	51,600	6,486,000	500	13,000
Farm whol./co-ops	92,000	1,800	4,524,100	742,100	1,600	52,600	5,414,100	500	10,800
Retail garden ctrs.	72,000	1,300	3,791,900	703,400	1,600	49,200	4,619,400	500	9,200
Fertilizer app.	73,000	1,300	4,254,800	717,100	1,400	50,100	5,097,700	500	10,200
Lab. supply	9,000	0	220,700	83,400	100	5,600	318,800	100	6,400
Total	442,000	8,200	20,398,100	3,803,900	7,400	254,400	24,914,100	2,500	10,000

* Totals may not add due to rounding.

AVERAGE COST PER AN FACILITY—HIGH POPULATION/HIGH TRANSACTIONS ESTIMATE *

	Reg. activities ($)	Appeals ($)	Point of sale (Web portal) ($)	Record-keeping ($)	Reporting theft/loss ($)	Audits/ inspections ($)	Total seller cost ($)	Number of AN facilities	Average cost ($)
AN fert. manuf.	8,000	0	311,200	43,100	100	2,700	365,100	0	14,000
AN expl. manuf.	3,000	0	125,700	17,400	0	1,100	147,300	0	14,700
Fertilizer mixers	123,000	2,600	7,181,800	994,800	1,700	62,200	8,366,000	600	13,900
Explosives dist.	202,000	4,200	21,807,900	1,668,500	3,100	103,200	23,788,900	1,000	23,800

AVERAGE COST PER AN FACILITY—HIGH POPULATION/HIGH TRANSACTIONS ESTIMATE *—Continued

	Reg. activities ($)	Appeals ($)	Point of sale (Web portal) ($)	Record-keeping ($)	Reporting theft/loss ($)	Audits/ inspections ($)	Total seller cost ($)	Number of AN facilities	Average cost ($)
Farm whol./co-ops	184,000	3,400	17,841,300	1,484,200	3,200	105,100	19,621,100	1,000	19,600
Retail garden ctrs.	357,000	6,000	37,281,300	3,517,200	7,900	246,100	41,415,400	2,500	16,600
Fertilizer app.	146,000	2,800	16,764,200	1,434,200	2,900	100,100	18,450,200	1,000	18,500
Lab. supply	19,000	500	1,090,400	166,800	300	11,100	1,288,200	100	12,900
Total	1,042,000	19,500	102,403,800	9,326,200	19,200	631,600	113,442,200	6,200	18,200

*Totals may not add due to rounding.

7. Identification of Duplication, Overlap and Conflict With Other Federal Rules

A thorough discussion of the relationship to other rules is provided earlier in section II.D of this preamble.

C. Executive Order 13132: Federalism

Executive Order 13132 requires DHS to develop a process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' To meet this requirement, the Department has, and will continue to, consult with State fertilizer control officials, members of the American Association of Plant Food Control Officials, and others throughout the development of these regulations. Such consultation is expressly required by 6 U.S.C. 488a(g). Consultation with the aforementioned groups has informed the Department on potential regulatory avenues, and on the use and movement of ammonium nitrate through its life cycle within the potentially regulated community. Additionally, the Department is hereby specifically requesting comments from State and local officials on regulatory policies that have federalism implications.

Chief among potential federalism implications is preemption of State ammonium nitrate regulations. As discussed in Part II.D of this preamble, a number of States currently regulate the security of ammonium nitrate. Subtitle J explicitly addresses preemption of such regulations, and ''preempts the laws of any State, to the extent that such laws are inconsistent with [Subtitle J], except that [Subtitle J] shall not preempt any State law that provides additional protection against the acquisition of ammonium nitrate by terrorists or the use of ammonium nitrate in explosives in acts of terrorism or for other illicit purposes, as determined by the [Department].'' *See* 6 U.S.C. 488g(b). The Department specifically seeks comment on the interaction of the proposed rule with existing State and local laws and regulations, including comment on any laws that may be inconsistent with Subtitle J and laws that provide additional protections against the acquisition of ammonium nitrate or its use in terrorist attacks.

D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), enacted as Public Law 104–4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The primary cost estimate for this proposed rulemaking would not impose such an unfunded mandate on State, local, or tribal governments, but the upper end of the estimate would show an unfunded mandate in excess of $100 million (adjusted for inflation) on the private sector. The analysis required under Title II of UMRA is satisfied by the regulatory impact assessment prepared in conjunction with this NPRM.

The Department recognizes that some AN Facilities of entities that purchase ammonium nitrate may be owned by state or local government entities. These entities would be required to comply with the provisions of this proposed rule.

Further, under Subtitle J, the Department may enter into cooperative agreements with the USDA or any State department of agriculture to carry out the provisions of Subtitle J. *See* 6 U.S.C. 488c(a)(1). Subtitle J further requires the Department, at the request of a governor of a State, to delegate to that State the authority to carry out the administration and enforcement of Subtitle J, if the Department determines that the State is capable of satisfactorily carrying out such functions. *See* 6 U.S.C. 488c(b)(2). If the Department delegates any functions to a State, subject to the availability of appropriations, the Department must provide to the state sufficient funds to carry out those functions. *See* 6 U.S.C. 488c(b)(3).

The Department proposes the following process for evaluating requests from governors: If a State is interested in performing the administration and enforcement activities required by Subtitle J, the governor of the State must submit a written request to the Department asking for delegation of those authorities. Upon receipt of the request, the Department will initiate an evaluation to determine if the State is capable of satisfactorily performing those functions and, upon completion of the evaluation, will provide the State with a written response informing it of the Department's determination. In order to make a fair evaluation, the Department is likely to request information from the State and consult with the State before a final determination is made. Because the responsibility would be transferred only at the request of the state, and only when funding is available, no unfunded mandate would be created.

E. National Environmental Policy Act

The Department has analyzed this proposed rule for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) under Department of Homeland Security Directive 023–01—Environmental Planning Program, and has concluded that this proposed rule comes within Categorical Exclusion A3 ''promulgation of rules * * * (a) of a strictly administrative or procedural nature.'' We find no basis for believing that there are extraordinary circumstances which would require further analysis; however, we invite comment on this conclusion.

F. Paperwork Reduction Act

This NPRM contains collection of information requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). ''Collection of information,'' as defined in 5 CFR 1320.3(c), includes reporting, record

keeping, monitoring, posting, labeling, and other similar actions.

Subtitle J provides DHS with authority to regulate the sale and transfer of ammonium nitrate. This collection will enable the Department to ''regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility * * * to prevent the misappropriation or use of ammonium nitrate in an act of terrorism.'' *See* 6 U.S.C. 488a(a).

This NPRM introduces a new collection with OMB Control Number 1670–NEW. The Ammonium Nitrate Security Program information collection has eight new instruments: Ammonium Nitrate Registration; Appeals for Denial or Revocation of AN Registered User Numbers; Purchaser Verification; Ammonium Nitrate Helpdesk; Electronic Recordkeeping Database; Reporting Theft and Loss; Adjudication or Appeal of an Order Assessing Civil Penalty; and Inspections and Audits.

This NPRM includes a solicitation for comments for a new information collection, 1670–NEW. Any comments submitted will be reviewed by DHS and OMB prior to publication of a final rule, and prior to OMB approval of this new information collection. This NPRM describes the nature of the information collection, the categories of respondents, and estimated burdens and costs.

Under the protections provided by the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The Department will begin collecting information as soon as an OMB control number is issued, or as soon as the mechanism for collecting information is publicly available, or when the rule implementing the Ammonium Nitrate Security Program becomes effective, whichever is latest.

TABLE 1—ESTIMATES OF ANNUALIZED BURDEN HOURS AND COSTS

Instrument	Number of respondents	Responses per respondent	Avg. burden per response (in hours)	Total annual burden (in hours)	Total annual respondent cost (in dollars)
Ammonium Nitrate Registration	116,800	1	2.02	235,912	11,114,000
Appeals for Denial or Revocation of AN Registered User Numbers	223	1	6.00	1,336	49,500
Purchaser Verification	6,236	4,705	0.08	2,445,001	93,262,600
Ammonium Nitrate Helpdesk	248,460	119	0.02	551,114	20,680,100
Electronic Recordkeeping Database	6,236	4,705	0.02	448,992	8,591,600
Reporting of Theft & Loss	125	1	2.80	349	18,300
Adjudication or Appeal of an Order Assessing Civil Penalty	Less Than 10	N/A	N/A	N/A	N/A
Inspections and Audits	1,559	1	12.00	18,708	621,100

Title: Ammonium Nitrate Registration

Summary of Collection of Information: Information is collected through a web-based portal directly from each applicant who wishes to apply for an AN Registered User Number. The information collected will be used to determine if the applicant is eligible for an AN Registered User Number. Specifically, 6 U.S.C. 488a(i)(2)(A) requires the Department to conduct a check of identifying information of all applicants against identifying information that appears in the TSDB.

Consistent with 6 U.S.C. 488a(i)(3)(A) and 6 U.S.C. 488a(i)(3)(B), to the extent practicable, the Department intends to approve or deny each registration application, and to issue each AN Registered User Number, not later than 72 hours after the time DHS receives a complete registration application. DHS may deny an applicant an AN Registered User Number if the TSDB indicates that the applicant may pose a threat to national security. *See* 6 U.S.C. 488a(i)(2)(B).

As proposed in section 31.215(a), at least one individual who is designated to act on behalf of a facility for purposes of compliance with this regulation must (1) apply for an AN Registered User Number, and (2) register as a Designated AN Facility POC for the AN Facility. In addition, sections 31.210 and 31.215 would allow any individual who has an ownership interest in an AN Facility; is designated to act on behalf of a facility for purposes of compliance with this regulation, such as, possibly, a site manager, sales manager, or corporate officer; is involved in the sale or transfer of ammonium nitrate at an AN Facility, such as a sales clerk or cashier; or performs ammonium nitrate application services to register as an AN Seller. Sections 31.210 and 31.215 would require that any person who individually performs a sale or transfer of ammonium nitrate on behalf of an AN Facility, or who performs ammonium nitrate application services, must be registered. Pursuant to section 31.205 of the proposed rule, any person who intends to purchase ammonium nitrate must also be registered.

Use of: The information collected will be used to (1) conduct a check of identifying information of applicants against identifying information that appears in the TSDB, and (2) issue the Department's approval or denial of each registration application.

Need for Information: The information collected is needed to comply with section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act, which requires the Department to issue AN Registered User Numbers.

Description of the Respondents: DHS anticipates that there will be an average of 116,800 respondents annually.

Frequency of Response: On occasion.

Annual Burden Estimate: Each respondent is estimated to have a burden of 2.02 hours to register, update, and subsequently renew his/her AN Registered User Number. The annual hour burden is estimated to be 235,912 hours.

Title: Appeals for Denial or Revocation of AN Registered User Numbers.

Summary of Collection of Information: Individuals who have had their AN Registered User Numbers denied or revoked may appeal the Department's denials or revocations, pursuant to section 31.250 of the proposed rule. Each individual requesting an appeal is required to file a Request for Materials, a Request for Appeal, and other filings as necessary.

Use of: The information collected will be used to process appeals.

Need for Information: The Department needs the collected

information to ensure that all necessary information is collected in order to process appeals and records correction requests.

Description of the Respondents: DHS anticipates that there will be an average of 223 respondents annually.

Frequency of Response: On occasion.

Annual Burden Estimate: Each respondent is estimated to have a burden of 6 hours to complete the necessary filings. The annual hour burden is estimated to be 1,336 hours.

Title: Purchaser Verification.

Summary of Collection of Information: AN Sellers will be required to conduct verification of AN Purchaser's identities and AN Registered User Numbers prior to sales and transfers of ammonium nitrate, as required by sections 31.305, 31.310, and 31.315 of the proposed rule. Verification will involve the submission to DHS by AN Sellers of prospective purchasers' AN Registered User Numbers, of matching information (*e.g.,* names and drivers' license numbers) from AN Purchasers' photo identification documents, and of the names of AN Agents taking possession of ammonium nitrate on behalf of prospective purchasers. As part of this information collection AN Sellers will also submit information identifying themselves, including their own AN Registered User Numbers, to DHS. AN Sellers will submit this information to DHS through the Purchaser Verification Portal or the Purchaser Verification Call Center. The Purchaser Verification Portal or Purchaser Verification Call Center will compare information submitted as to each AN Purchaser or AN Seller against the information on record for that AN Purchaser or AN Seller.

Use of: The information collected will be used to conduct verification of AN Registered User Numbers and of AN Purchasers' and AN Agents' identities, prior to transfer of ammonium nitrate, as required by sections 31.305, 31.310, and 31.315 of the proposed rule.

Need for Information: The Department needs the information to verify that ammonium nitrate is only sold or transferred by individuals authorized by the Department to individuals authorized by the Department.

Description of the Respondents: DHS anticipates that there will be an average of 6,236 respondents annually.

Frequency of Response: On occasion.

Annual Burden Estimate: Each respondent is estimated to have a burden of 0.08 hours to complete AN Registered User Number verification. The annual hour burden is estimated to be 2,445,001 hours.

Title: Ammonium Nitrate Helpdesk.

Summary of Collection of Information: The Ammonium Nitrate Helpdesk will respond to questions from industry and the public.

Use of: The information collected will be used to respond to questions from industry and the public.

Need for Information: The Department needs to collect the information from the individuals contacting the Ammonium Nitrate Helpdesk to respond to their questions.

Description of the Respondents: DHS anticipates that there will be an average of 248,460 respondents annually.

Frequency of Response: On occasion.

Annual Burden Estimate: Each respondent is estimated to have a burden of 0.02 hours per AN Helpdesk contact. The annual hour burden is estimated to be 551,114 hours.

Title: Electronic Recordkeeping Database.

Summary of Collection of Information: To collect information to support AN Facilities with the recordkeeping requirements proposed in section 31.315 of the proposed rule.

Use of: The information collected will be used to support AN Facilities with the recordkeeping requirements proposed in section 31.315 of the proposed rule.

Need for Information: Under section 31.315, AN Facilities would be required to keep various records. The use of this recordkeeping instrument, however, is voluntary.

Description of the Respondents: DHS anticipates that there will be an average of 6,236 respondents annually.

Frequency of Response: On occasion.

Annual Burden Estimate: Each respondent is estimated to have a burden of 0.02 hours. The annual hour burden is estimated to be 448,992 hours.

Title: Reporting Theft and Loss.

Summary of Collection of Information: To report a theft or loss of ammonium nitrate, an individual would contact ATF. ATF will collect information and other details for a report of a theft or loss of ammonium nitrate, pursuant to sections 31.400 and 31.405 of the proposed rule.

Use of: The information collected would be used to track and potentially respond appropriately to the theft or loss of ammonium nitrate.

Need for Information: The information collected is needed to track and potentially respond appropriately to the theft or loss of ammonium nitrate.

Description of the Respondents: DHS anticipates that there will be an average of 125 respondents annually.

Frequency of Response: On occasion.

Annual Burden Estimate: Each respondent is estimated to have a burden of 2.8 hours to complete a theft or loss of ammonium nitrate report. The annual hour burden is estimated to be 349 hours.

Title: Adjudication or Appeal of an Order Assessing Civil Penalty.

Summary of Collection of Information: Pursuant to section 31.700 of the proposed rule, any person or entity against whom an Order Assessing Civil Penalty has been issued is entitled to a hearing and adjudication, by a Presiding Officer, on any issue of material fact relevant to any civil penalty issued against such person or entity. Pursuant to section 31.735 of the proposed rule any person or entity having received an Initial Decision has the right to appeal.

Use of: The information collected will be used to conduct hearings, adjudications, and appeals.

Need for Information: The information collected is needed to conduct hearings, adjudications, and appeals.

Description of the Respondents: DHS anticipates that there will be fewer than 10 respondents annually.

Frequency of Response: On occasion.

Annual Burden Estimate: The Department did not estimate the annual burden.

Title: Inspections and Audits

Summary of Collection of Information: Pursuant to section 31.500 of the proposed rule, the Department is authorized to enter AN Facilities, or other locations where records are stored, to inspect and audit the records proposed in section 31.315. DHS may also inspect and audit any other records that pertain to misappropriation or preventing misappropriation of ammonium nitrate, and to inspect and audit any other records required by the Assistant Secretary to be maintained pursuant to Subtitle J. During an inspection or audit the Department may copy such records. DHS may also take original copies of pertinent records out of the subject AN Facilities for duplication. DHS may also perform remote inspections or audits, and require AN Facilities, AN Facility Representatives, and Designated AN Facility POCs to make the records available to the Department by facsimile, mail, or e-mail.

Use of: The information collected will be used to perform inspections or audits.

Need for Information: The information collected is needed to perform inspections or audits.

Description of the Respondents: DHS anticipates that there will be an average of 1,559 respondents annually.

Frequency of Response: On occasion.

Annual Burden Estimate: Each respondent is estimated to have a burden of 12 hours to prepare for and comply with an inspection or audit. The annual hour burden is estimated to be 18,708 hours.

Solicitation of Comments

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department has submitted a copy of the proposed rule to OMB for its review of the collections of information. DHS is soliciting comments to:

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may submit comments to DHS or OMB on the information collection requirements by October 3, 2011. Direct information collection comments to the DHS or OMB addresses listed in the **ADDRESSES** section of this NPRM. A comment is most effective if DHS or OMB receives it within 30 days of the publication of this NPRM.

G. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as security, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. In addition, the general benefits and desirability of free trade influenced the development of this notice of proposed rulemaking to remove or diminish, to the extent feasible, barriers to international trade, including both barriers affecting the export of American goods and services to foreign countries and barriers affecting the import of foreign goods and services into the United States.

As entities that purchase or sell ammonium nitrate, or as individual AN Purchasers and AN Sellers, importers and exporters would be required to register with the Department and comply with the requirements of the NPRM in the same manner as their domestic counterparts when ammonium nitrate physically changes possession, as a part of sales or transfers by ammonium nitrate facilities, within the jurisdiction of the United States. Thus, DHS has assessed the potential effect of this NPRM and has determined that it would not create unnecessary barriers to international trade.

For the reasons set forth in the preamble, the Department of Homeland Security proposes to add Part 31 to Title 6, Code of Federal Regulations, to read as follows:

Title 6—Domestic Security

Chapter 1—Department of Homeland Security, Office of the Secretary

PART 31—AMMONIUM NITRATE SECURITY PROGRAM

Subpart A—General

Sec.
31.100 Purpose.
31.105 Definitions.
31.110 Applicability.
31.115 Severability.

Subpart B—Registration of AN Purchasers, AN Sellers, AN Facility Representatives, and Designated AN Facility POCs

31.200 Permitted Applicants, Generally.
31.205 Permitted AN Purchasers.
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31.215 AN Facility personnel registration requirements.
31.220 Registration procedures and registration updates.
31.225 AN Registered User number applicant vetting.
31.230 Registration approval and denial.
31.235 Registration expiration.
31.240 Registration extension.
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Subpart C—Point of Sale Requirements

31.300 General transfer and sale restrictions.
31.305 Verification of AN Purchaser AN Registered User numbers and identities—purchases not involving AN Agents.
31.310 Verification of AN Purchaser AN Registered User numbers and identities—purchases involving AN Agents.
31.315 Recordkeeping requirements.

Subpart D—Reporting Theft and Loss

31.400 Reporting obligations.
31.405 Reporting.

Subpart E—Inspections and Audits

31.500 Authority.
31.505 Manner of inspections and audits.
31.510 Inspectors.
31.515 Records availability requirements.

Subpart F—Civil Penalties

31.600 Orders Assessing Civil Penalty, generally.
31.605 Setting Civil Penalty amounts.
31.610 Procedures for issuing Orders Assessing Civil Penalty.

Subpart G—Adjudications and Appeals

31.700 Neutral adjudications, generally.
31.705 Appointment of presiding officers.
31.710 Commencement of adjudication proceedings.
31.715 Prohibition on ex parte communications during adjudication.
31.720 Burden of proof.
31.725 Hearing and adjudication procedures.
31.730 Completion of adjudication procedures.
31.735 Appeals.

Subpart H—Other

31.800 State law preemption.

Authority: Pub. L. 110–161, sec. 563.

Subpart A—General

§ 31.100 Purpose.

The purpose of this part is to enhance the security of the Nation by regulating the sale and transfer of ammonium nitrate, and to implement Section 563 of the Fiscal Year 2008 Consolidated Appropriations Act, Public Law 110–161 (December 26, 2007).

§ 31.105 Definitions.

Ammonium nitrate (AN). (1) Notwithstanding paragraph (2) of this definition, ammonium nitrate is—

(i) Solid ammonium nitrate that is chiefly the ammonium salt of nitric acid, that contains not less than 33 percent nitrogen by weight, or

(ii) Any mixture containing 30 percent or more solid ammonium nitrate, by weight, that is chiefly the ammonium salt of nitric acid. The solid ammonium nitrate in the mixture must contain not less than 33 percent nitrogen by weight.

(2) The following are not ammonium nitrate:

(i) Mixtures containing less than 30 percent ammonium nitrate; or

(ii) Mixtures classified as ''explosives'' under 27 CFR 555.11; or

(iii) Ammonium nitrate or mixtures containing ammonium nitrate weighing less than 25 pounds; or

(iv) Cold packs.

AN Agent. Any person who obtains possession of ammonium nitrate on behalf of an AN Purchaser.

AN Facility. Any person or entity that produces, sells or otherwise transfers ownership of, or provides application services for, ammonium nitrate.

AN Facility Representative. Any AN Facility operator, owner, or employee who is designated as an AN Facility

Representative by the subject AN Facility.

AN Purchaser. Any person, other than an AN Agent, who purchases or obtains ammonium nitrate from an AN Facility.

AN Registered User. A person who possesses a valid AN Registered User Number for the purpose(s) of acquiring, possessing, producing, purchasing, selling, transferring ownership or possession of, and/or providing application services for ammonium nitrate.

AN Registered User Number. A registered user number issued by the Department of Homeland Security under subpart B of this part to a person intending to acquire, possess, produce, purchase, sell, transfer ownership or possession of, and/or provide application services for ammonium nitrate.

AN Seller. Any person designated as an AN Seller by the AN Facility at which he/she works or with which he/she is associated, for the purpose(s) of performing sales or transfers of ammonium nitrate or for performing certain other regulatory compliance activities under this Part.

Applicant. Any person who has submitted an application for an AN Registered User Number for the purpose(s) of acquiring, possessing, producing, purchasing, selling, transferring ownership or possession of, and/or providing application services for ammonium nitrate.

Application services. The provision of services related to the physical deposit of fertilizer onto turf, fields, crops, or other agricultural property, where these services are provided by a person or entity other than the person or entity owning or operating the property upon which the fertilizer is deposited. The provision of application services is not a sale or transfer of ammonium nitrate.

Assistant Secretary. The Assistant Secretary for Infrastructure Protection of the United States Department of Homeland Security, or any successors to that position within the Department, or such other Department officials as may be designated by the Assistant Secretary to act on his/her behalf.

Cold pack. A small, commercially-available package commonly used as a replacement for ice in the application of first aid, containing unmixed water and ammonium nitrate that, immediately prior to use, can be manipulated to cause the comingling of the water and the ammonium nitrate resulting in an endothermic reaction that significantly lowers the temperature of the package.

Department. The United States Department of Homeland Security.

Designated AN Facility POC. An AN Facility Representative who is designated by an AN Facility as that AN Facility's chief point of contact (POC) for communications with the Department for purposes of compliance with this Part.

Office of the General Counsel. The Office of the General Counsel of the United States Department of Homeland Security.

Photo identification document. Any of the following documents containing a unique document number:

(1) An unexpired passport issued by a foreign government which contains a photograph; or

(2) An unexpired document issued by a U.S. Federal, State, or tribal government that includes the following information for the person:

(i) Full name;

(ii) Date of birth; and

(iii) Photograph; or

(3) Such other documents that the Department may designate as valid identification documents.

Secretary. The Secretary of Homeland Security or such other Department officials as may be designated by the Secretary of Homeland Security to act on his/her behalf.

Subtitle J. Subtitle J of the Homeland Security Act of 2002, as created by Section 563 of the Fiscal Year 2008 Consolidated Appropriations Act, Public Law 110–161 (December 26, 2007).

Transfer. The transfer of possession or ownership of ammonium nitrate from one person or entity to another person or entity for use outside of the AN Facility from which the ammonium nitrate is being transferred. Transfers of ammonium nitrate include transfers of possession or ownership that occur as part of sales and other business or commercial transactions, and also include transfers of possession or ownership that are not part of sales or other business or commercial transactions. The physical deposit of fertilizer onto turf, fields, crops, or other agricultural property is not a transfer of ammonium nitrate.

Under Secretary. The Under Secretary for National Protection and Programs of the United States Department of Homeland Security, or any successors to that position within the Department, or such other Department officials as may be designated by the Under Secretary to act on his/her behalf.

§ 31.110 Applicability.

This Part applies to any person or entity that possesses, acquires, purchases, sells, transfers, or provides application services for ammonium nitrate.

§ 31.115 Severability.

If a court finds any portion of this Part to have been promulgated without proper authority, the remainder of this Part will remain in full effect.

Subpart B—Registration of AN Purchasers, AN Sellers, AN Facility Representatives, and Designated AN Facility POCs

§ 31.200 Permitted applicants, generally.

Only persons who intend to acquire, possess, produce, purchase, sell, transfer ownership or possession of, and/or provide application services for ammonium nitrate may register or attempt to register under this Subpart.

§ 31.205 Permitted AN Purchasers.

No person may purchase or take ownership of ammonium nitrate, or request that an AN Agent take possession of ammonium nitrate on his/her behalf, without a valid AN Purchaser AN Registered User Number issued under this Subpart.

§ 31.210 Permitted AN Sellers.

(a) Only persons registered under this Subpart as AN Sellers, AN Facility Representatives, or Designated AN Facility POCs may sell or transfer possession of ammonium nitrate to any person or entity.

(b) Only persons registered under this Subpart as AN Sellers, AN Facility Representatives, or Designated AN Facility POCs may, as required by this Part, verify AN Registered User Numbers of AN Purchasers, the identities of AN Purchasers, and the identities of AN Agents.

(c) Only persons registered under this Subpart as AN Sellers, AN Facility Representatives, or Designated AN Facility POCs may perform ammonium nitrate application services.

§ 31.215 AN Facility personnel registration requirements.

(a) Designated AN Facility POC. (1) Each AN Facility must have one Designated AN Facility POC registered on its behalf.

(2) Only one Designated Facility POC can be registered for each AN Facility.

(b) *AN Facility Representatives.* Each AN Facility must have at least one AN Facility Representative registered on its behalf.

(c) *AN Sellers.* Any person affiliated with an AN Facility, who is neither a Designated AN Facility POC nor an AN Facility Representative, must register under this Subpart as an AN Seller in order to perform the activities described in 6 CFR 31.210.

§ 31.220 Registration procedures and registration updates.

(a) *Submission of Application Information.* (1) Applications for registration under this Subpart must be submitted to the Department through an online web portal to be developed by the Department. The web address of this online web portal will be announced by the Department in a future notice published in the **Federal Register.**

(2) Each applicant and AN Registered User must notify the Department of any changes to his/her submitted application information, within 30 days of any such changes, through the online web portal used for registration application.

(b) *Application Information Identifying Type of Applicant.* In order for an applicant to be considered for registration, he/she must identify whether he/she is applying as an AN Seller, AN Facility Representative, Designated AN Facility POC, and/or AN Purchaser. An applicant may apply for more than one role.

(c) *Application Information—General.* (1) In order for an applicant to be considered for registration, his/her registration application must include his/her name, address, telephone number, photo identification document type, photo identification document issuing entity, photo identification document number, place of birth, date of birth, citizenship, gender, any other information deemed necessary by the Department to carry out vetting under 6 CFR 31.225, and, as appropriate, any other information deemed necessary by the Department to verify the applicant's enrollment in a Department program that conducts equivalent TSDB vetting.

(2) Each AN Purchaser applicant's registration application must also include a description of the intended use of the ammonium nitrate planned to be purchased or acquired by the applicant.

(3) Each AN Seller, AN Facility Representative, and Designated AN Facility POC must also submit information identifying all AN Facilities at or for which he/she will serve as an AN Seller, AN Facility Representative, or Designated AN Facility POC.

(d) *Identifying AN Agents.* (1) AN Purchasers and AN Purchaser applicants may, through the online web portal mentioned in 6 CFR 31.220(a), identify any AN Agents whom they authorize to obtain ammonium nitrate on their behalves.

(2) When a person named as an AN Agent is no longer authorized to obtain ammonium nitrate on behalf of an applicant or AN Purchaser, the applicant or AN Purchaser must notify the Department through the online web portal within 30 days of the date on which the AN Agent becomes unauthorized to obtain ammonium nitrate.

§ 31.225 AN Registered User number applicant vetting.

(a) The Department will vet applicants' identifying information against the Terrorist Screening Database (TSDB) and/or verify each applicant's enrollment in a Department program that conducts equivalent TSDB vetting.

(b) The Department will compare each AN Registered User's identifying information against new and/or updated TSDB records as those new and/or updated records become available.

§ 31.230 Registration approval and denial.

(a) *Registration approval.* The Department will issue AN Registered User Numbers based on the results of TSDB vetting and the submission of complete registration applications by applicants.

(b) *Registration denial.* A registration applicant may be denied an AN Registered User Number if:

(1) Based on TSDB vetting and/or verification of previous TSDB vetting results under 6 CFR 31.225, the Assistant Secretary determines that it is in the interest of national security to deny the registration application; or

(2) The applicant submits an incomplete registration application; or

(3) Information contained in the registration application is fraudulent or false.

(c) *AN Registered User number issuance.* The Department will provide AN Registered User Numbers to approved applicants by e-mail or by an online web portal to be developed by the Department.

(d) *Notice of registration denial.* The Assistant Secretary will provide Notice of Registration Denial to denied applicants by e-mail or by an online web portal to be developed by the Department. This Notice will include the date of denial, and will also include instructions about how to appeal such a denial pursuant to 6 CFR 31.250.

(e) *Notice of delay.* (1) When the Department is unable to approve or deny a registration application within 72 hours of receipt, the Department will provide Notice of Delay to the applicant by e-mail or by an online web portal to be developed by the Department.

(2) When the Department determines that, in the interest of national security, longer than 72 hours is required to review a registration application or to issue or deny an AN Registered User Number, the Department will provide Notice of Delay to the applicant by e-mail or by an online web portal to be developed by the Department.

§ 31.235 Registration expiration.

An AN Registered User Number issued under this subpart expires five years after the date it is issued.

§ 31.240 Registration extension.

(a) *Extension prior to registration expiration.* An AN Registered User can apply for an extension of his/her AN Registered User Number not more than 60 days before its scheduled expiration.

(b) *Extension after registration expiration.* An AN Registered User can apply for an extension of his/her AN Registered User Number after the expiration date of that AN Registered User Number for up to one year from the date of expiration.

(c) *Application for new number after registration expiration of more than one year.* An AN Registered User with an AN Registered User Number that has been expired for more than one year must apply for, and obtain, a new AN Registered User Number before engaging in the acquisition, purchase, sale, or transfer of ammonium nitrate, or before providing ammonium nitrate application services.

(d) *Extension procedures.* An AN Registered User can apply for an extension of his/her AN Registered User Number by following the registration procedures set forth in 6 CFR 31.220. Extensions will be issued or denied using the registration issuance and denial procedures and criteria set forth in 6 CFR 31.230.

§ 31.245 Registration revocation.

(a) The Assistant Secretary may revoke an AN Registered User Number if he/she determines that:

(1) It is in the interest of national security to revoke that AN Registered User Number based on the results of the activities described in 6 CFR 31.225; or

(2) The AN Registered User holding that AN Registered User Number obtained it by submitting fraudulent or false information.

(b) The Assistant Secretary will provide Notice of Revocation to each AN Registered User whose AN Registered User Number is revoked. Notice of Revocation will be provided prior to the effective date of revocation, unless the Assistant Secretary determines that it is in the interest of national security to revoke an AN Registered User Number prior to or at the same time as provision of Notice of Revocation. Notice of Revocation will include both the date on which the subject AN Registered User Number is

to be revoked and the means by which revocation can be appealed.

(c) Notices of Revocation will be disseminated to subject AN Registered Users by e-mail, by an online web portal to be developed by the Department, or by other written communication.

§ 31.250 Appealing registration denial or revocation determination.

(a) *Appealing registration denial.* A person whose application for registration has been denied may appeal the Assistant Secretary's denial of his/her application under this subsection.

(b) *Appealing revocation.* A person who has received a Notice of Revocation may appeal the Assistant Secretary's revocation determination under this subsection.

(c) *Appellant's request for materials.* To appeal a denial or revocation determination, a person whose registration application is denied, or whose AN Registered User Number is revoked, must initiate an appeal by filing a Request for Materials with the Office of the General Counsel. This Request for Materials must be submitted to the Office of the General Counsel within 60 days of the date of denial or revocation.

(d) *The department's response.* The Department will serve the appellant with copies of the releasable materials upon which denial or revocation was based within 60 days of receipt of a Request for Materials, unless the Department determines that additional time is required in the interest of national security. The Department will not include any classified information in this Response, nor will it include any other information or material protected from disclosure under law. As appropriate, the Department will include in this Response unclassified summaries of classified evidence supporting denial or revocation.

(e) *Appellant's request for appeal.* To appeal the denial or revocation, the appellant must serve upon the Office of the General Counsel a Request for Appeal within 60 days of service of the Department's Response under paragraph (d) of this section. The appellant's Request for Appeal must be written and include the rationale and information upon which the appellant disputes the basis of denial or revocation.

(f) *Correcting materials.* The Request for Appeal must include any corrections, additions, or clarifications to the materials provided by the Department under paragraph (d) of this section if the appellant believes that his/her denial or revocation was based on materials or information that he/she believes to be erroneous or incomplete.

(g) *Final determination.* (1) After reviewing an appellant's Request for Appeal, the Department will serve the appellant with a Final Determination.

(2) A Final Determination will be signed by the Under Secretary, and will:

(i) Uphold the denial or revocation; or

(ii) Reverse the denial or revocation.

(3) To the extent practicable, the Department will issue a Final Determination within 72 hours of receipt of the appellant's Request for Appeal, unless the Department determines that additional time is required in the interest of national security. The Department will not include any classified information in this service, nor will it include any other information or material protected from disclosure under law.

(4) Following a Final Determination reversing a registration denial, the Department will issue to the appellant an AN Registered User Number as described in 6 CFR 31.230(c).

(h) *Extension of time.* For good cause shown, the Department may grant an appellant an extension of time to file a Request for Materials or Request for Appeal. An appellant's request for an extension of time must be in writing and must be received by the Office of the General Counsel within a reasonable time before the due date to be extended; or an appellant may request an extension after the passing of a due date by sending a written request describing why the failure to file within the prescribed time limits should be excusable.

(i) *Final agency action.* For purposes of judicial review, a Final Determination constitutes final agency action by the Department. A Notice of Registration Application Denial or a Notice of Registration Revocation constitutes final agency action if not timely appealed pursuant to this section.

Subpart C—Point of Sale Requirements

§ 31.300 General transfer and sale restrictions.

(a) An AN Facility, AN Seller, AN Facility Representative, or Designated AN Facility POC may only transfer possession of ammonium nitrate to an AN Purchaser in possession of a valid AN Registered User Number issued under subpart B of this part, or to a person acting as an authorized AN Agent under this Part.

(b) An AN Facility, AN Seller, AN Facility Representative, or Designated AN Facility POC may only transfer possession of ammonium nitrate to an AN Purchaser or AN Agent after verification of his/her identity as required by this subpart.

(c) An AN Facility, AN Seller, AN Facility Representative, or Designated AN Facility POC may not transfer possession of ammonium nitrate to an AN Agent when such AN Agent is attempting to obtain ammonium nitrate on behalf of an AN Purchaser whose registration is deficient under this Part.

(d) An AN Facility, AN Seller, AN Facility Representative, or Designated AN Facility POC may only transfer possession of ammonium nitrate to an AN Agent after confirming with either the Department or the AN Purchaser that the AN Agent is authorized to act on the AN Purchaser's behalf.

§ 31.305 Verification of AN Registered User Numbers and Identities—purchases or transfers not involving AN Agents.

(a) *AN Purchaser electronic or telephonic verification.* Prior to transferring possession of ammonium nitrate, the AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must obtain the unexpired AN Registered User Number and the name of the AN Purchaser seeking to take possession of ammonium nitrate.

(1) Prior to transfer, the AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must submit this collected information to the Department by telephone or through an online web portal to be developed by the Department.

(2) Prior to transfer, the AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must also submit information identifying the AN Facility from which ammonium nitrate is being transferred, as well as his/her own name and his/her own AN Registered User Number, to the Department by telephone or through the online web portal mentioned in 6 CFR 31.305(a)(1).

(3) Upon receipt of this information, the Department will determine whether the information provided indicates that the AN Seller, AN Facility Representative, or Designated AN Facility POC submitting this information is authorized to sell or transfer ammonium nitrate. The Department will also determine whether the information provided indicates that the person attempting to purchase or obtain ammonium nitrate is authorized under Subpart B of this Part to do so.

(4) The Department will then notify the AN Seller, AN Facility Representative, or Designated AN Facility POC, by telephone or through the online web portal mentioned in 6 CFR 31.305(a)(1), of the determinations made pursuant to 6 CFR 31.305(a)(3).

The AN Seller, AN Facility Representative, or Designated AN Facility POC may not transfer ammonium nitrate unless and until each of these determinations indicates that the Department has authorized the sale or transfer.

(b) *AN Purchaser visual verification.* Prior to transferring possession of ammonium nitrate, the AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must examine the photo identification document of the AN Purchaser seeking to take possession of ammonium nitrate.

(1) The photo identification document must contain a photograph of the person attempting to take possession of the ammonium nitrate. AN Sellers, AN Facility Representatives, or Designated AN Facility POCs must not transfer possession of ammonium nitrate to any person unable to provide a photo identification document. No AN Purchaser may take possession of, or attempt to take possession of, ammonium nitrate without presenting a photo identification document.

(2) The AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must not transfer possession of ammonium nitrate unless he/she determines, to the best of his/her ability, that the person attempting to take possession of ammonium nitrate is the same person as the person who is depicted on the examined photo identification document.

§ 31.310 Verification of AN Registered User Numbers and Identities—purchases or transfers involving AN Agents.

(a) *AN Purchaser electronic or telephonic verification.* An AN Seller, AN Facility Representative, or Designated AN Facility POC, prior to transferring possession of ammonium nitrate to an AN Agent, must obtain the name, the unexpired AN Registered User Number, the photo identification document type, the photo identification document issuing entity, and the photo identification document number of the AN Purchaser.

(1) Prior to transfer, the AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must submit this collected information to the Department by telephone or through an online web portal to be developed by the Department.

(2) Prior to transfer, the AN Seller, AN Facility Representative, or Designated AN Facility POC conducting the sale or transfer must also submit information identifying the AN Facility from which ammonium nitrate is being transferred, as well as his/her own name and his/her own AN Registered User Number, to the Department by telephone or through the online web portal discussed in 6 CFR 31.310(a)(1).

(3) Upon receipt of this information, the Department will determine whether the information provided indicates that the AN Seller, AN Facility Representative, or Designated AN Facility POC submitting this information is authorized to sell or transfer ammonium nitrate. The Department will also determine whether the information provided indicates that the AN Purchaser is authorized under Subpart B of this Part to purchase or obtain ammonium nitrate. The Department will not determine that the AN Purchaser is authorized to purchase or obtain ammonium nitrate unless the photo identification document information provided matches the photo identification document information previously provided by that person to the Department under 6 CFR 31.220(a)(2) or (c)(1).

(4) The Department will then notify the AN Seller, AN Facility Representative, or Designated AN Facility POC, by telephone or through the online web portal mentioned in 6 CFR 31.310(a)(1), of the determinations made pursuant to 6 CFR 31.310(a)(3). The AN Seller, AN Facility Representative, or Designated AN Facility POC may not transfer ammonium nitrate unless and until each of these determinations indicates that the Department has authorized the transfer.

(b) *Confirmation of agency.* An AN Seller, AN Facility Representative, or Designated AN Facility POC, prior to transferring possession of ammonium nitrate to an AN Agent, must obtain confirmation from the Department or from the AN Purchaser that the AN Agent is authorized to act on the AN Purchaser's behalf. This confirmation must be obtained in either of two ways:

(1) By submitting the name of the AN Agent to the Department by telephone or through the online web portal mentioned in 6 CFR 31.310(a)(1). If the named AN Agent has been previously authorized by the AN Purchaser to take possession of ammonium nitrate on his/her behalf, pursuant to 6 CFR 31.220(d), then the Department will provide a notice of confirmation, by telephone or through online web portal, to the AN Seller, AN Facility Representative, or Designated AN Facility POC making this submission.

(2) Orally from the AN Purchaser. Oral confirmation may be obtained by an AN Seller, AN Facility Representative, or Designated AN Facility POC representing the AN Facility conducting the transfer. Such oral confirmation must be obtained in person or by telephone, prior to transfer of possession to the AN Agent.

(c) *AN Agent visual verification.* Prior to transferring possession of ammonium nitrate to an AN Agent, an AN Seller, AN Facility Representative, or Designated AN Facility POC must examine the photo identification document of the AN Agent seeking to take possession of ammonium nitrate.

(1) The photo identification document must contain a photograph of the person attempting to take possession of the ammonium nitrate. AN Sellers, AN Facility Representatives, or Designated AN Facility POCs may not transfer possession of ammonium nitrate to persons unable to provide photo identification documents. An AN Agent must not take possession of, or attempt to take possession of, ammonium nitrate without presenting a photo identification document.

(2) The AN Seller, AN Facility Representative, or Designated AN Facility POC must not transfer possession of ammonium nitrate unless he/she determines, to the best of his/her ability, that the person attempting to take possession of the ammonium nitrate is the same person as the person who is depicted on the examined photo identification document, and is the same person as confirmed to be an authorized AN Agent under 6 CFR 31.310(b).

§ 31.315 Recordkeeping requirements.

(a) An AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must each ensure that the AN Facility maintains records pertaining to each sale or transfer of ammonium nitrate consisting, at a minimum, of the following:

(1) Date of sale or transfer;

(2) Form and amount of payment, if any;

(3) Quantity of ammonium nitrate sold or transferred;

(4) Type of packaging of the ammonium nitrate sold or transferred;

(5) Location where the AN Purchaser, or if applicable AN Agent, will take possession of the ammonium nitrate sold or transferred;

(6) Name, address, telephone number, AN Registered User Number, photo identification document type, photo identification document issuing entity, and photo identification document number of the AN Purchaser purchasing or taking possession of the ammonium nitrate sold or transferred;

(7) If an AN Agent takes possession of ammonium nitrate, name, address, telephone number, photo identification document type, photo identification document issuing entity, and photo identification document number of the AN Agent taking possession of the ammonium nitrate sold or transferred;

(8) If an AN Agent takes possession of ammonium nitrate, a record of the date and means by which confirmation of agency was received pursuant to 6 CFR 31.310(b); and

(9) Confirmation numbers or confirmation records, if any, received from the Department as part of the notification processes described in 6 CFR 31.305(a)(4) and 6 CFR 31.310(a)(4).

(b) In sales or transfers not involving AN Agents, AN Purchasers must provide the information required by 6 CFR 31.315(a)(6) to AN Facility personnel prior to transfer of ammonium nitrate. AN Facilities, AN Sellers, AN Facility Representatives, and Designated AN Facility POCs must not transfer possession of ammonium nitrate to any persons failing to provide this information prior to transfer.

(c) In sales or transfers involving AN Agents, AN Purchasers and/or the AN Agents obtaining ammonium nitrate on their behalves must provide the information required by 6 CFR 31.315(a)(6) and (7) to AN Facility personnel prior to transfer of ammonium nitrate. AN Facilities, AN Sellers, AN Facility Representatives, and Designated AN Facility POCs must not transfer possession of ammonium nitrate to any AN Agent if this information has not been provided prior to transfer.

(d) An AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must each ensure that the AN Facility maintains the records required by 6 CFR 31.315(a), as to each sale or transfer of ammonium nitrate, for a minimum of two years from the date of sale or transfer.

(e) An AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must each take reasonable actions to ensure that the AN Facility secures the records required by 6 CFR 31.315(a) from damage, theft, and loss.

Subpart D—Reporting Theft and Loss

§ 31.400 Reporting obligations.

(a) Any AN Facility Representative or Designated AN Facility POC who has knowledge of the theft or unexplained loss of ammonium nitrate must report such theft or loss to the Bureau of Alcohol, Tobacco, Firearms and Explosives of the U.S. Department of Justice (ATF), or direct other AN Facility personnel to report such theft or loss to ATF, as provided in 6 CFR 31.405.

(b) Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must ensure that the AN Facility implements internal reporting procedures which require all AN Facility Representatives, AN Sellers, and other AN Facility personnel (as appropriate) to notify the appropriate AN Facility Representative or Designated AN Facility POC of any theft or unexplained loss of ammonium nitrate, to report such theft or loss directly to ATF, or both.

§ 31.405 Reporting.

(a) *General reporting requirements.* Persons required to report theft or loss under this Subpart must report each theft or loss to ATF by telephone and by facsimile, not later than 24 hours after becoming aware of such theft or loss. If facsimile is not available, persons required to report theft or loss under this Subpart must report each theft or loss to ATF by telephone and U.S. mail, not later than 24 hours after becoming aware of such theft or loss.

(b) *Voluntary reporting.* Persons not required to report theft or loss under this Subpart may report theft or loss of ammonium nitrate by contacting ATF by the same means described in paragraph (a) of this section.

Subpart E—Inspections and Audits

§ 31.500 Authority.

(a) *On-site inspections and audits.* In order to assess compliance with the requirements of this part and with the requirements of subtitle J, and in order to prevent the misappropriation or use of ammonium nitrate in acts of terrorism, authorized Department officials may enter AN Facilities, or other locations where records are stored, to inspect and audit the records required to be maintained pursuant to 6 CFR 31.315, to inspect and audit any other records that pertain to misappropriation or preventing misappropriation of ammonium nitrate, and to inspect and audit any other records required by the Assistant Secretary to be maintained pursuant to Subtitle J.

(b) *Remote inspections and audits.* In order to assess compliance with the requirements of this part and with the requirements of subtitle J, and in order to prevent the misappropriation or use of ammonium nitrate in acts of terrorism, the Department may require AN Facilities, AN Facility Representatives, and Designated AN Facility POCs to make the records mentioned in 6 CFR 31.500(a) available to the Department by facsimile, mail, or e-mail.

§ 31.505 Manner of inspections and audits.

(a) *On-Site inspections and audits.* Authorized Department officials will conduct on-site inspections and audits at reasonable times and in reasonable manners. The Department will provide a minimum of 24 hours notice to an AN Facility, if possible through its Designated AN Facility POC, before any on-site inspection and audit, except when:

(1) The Assistant Secretary determines that an on-site inspection and audit without such notice is warranted by exigent circumstances and approves such on-site inspection and audit; or

(2) Any delay in conducting an on-site inspection and audit might be seriously detrimental to security, and the Assistant Secretary determines that an on-site inspection and audit without notice is warranted, and approves an Inspector to conduct such on-site inspection and audit.

(b) *Remote inspections and audits.* Authorized Department officials will conduct remote inspections and audits at reasonable times and in reasonable manners. The Department will provide a minimum of 24 hours notice to an AN Facility, if possible through its Designated AN Facility POC, before that AN Facility is required to remotely submit records to the Department. The Department may provide less than 24 hours notice before an AN Facility is required to remotely submit records to the Department only when:

(1) The Assistant Secretary determines that a remote inspection and audit without such notice is warranted by exigent circumstances and approves such remote inspection and audit; or

(2) Any delay in conducting a remote inspection and audit might be seriously detrimental to security, and the Assistant Secretary determines that a remote inspection and audit without notice is warranted, and approves an Inspector to conduct such remote inspection and audit.

§ 31.510 Inspectors.

(a) Inspections and audits will be conducted by personnel duly authorized and designated for that purpose as ''Inspectors'' by the Assistant Secretary, or any person who is authorized by the Department to perform inspections pursuant to a cooperative agreement or a delegation of authority established under subtitle J.

(b) An Inspector will, on request, present his or her credentials for examination by AN Facility personnel during an on-site inspection and audit, but these credentials may not be reproduced or retained by any AN Facility, by any AN Facility personnel, by any AN Seller, by any AN Facility Representative, or by any Designated AN Facility POC.

§ 31.515 Records availability requirements.

(a) *Records availability during on-site inspections and audits for which the department has provided at least 24 hours notice.* Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must make all records required to be maintained by this Part available to Inspectors immediately upon the commencement of an on-site inspection and audit. Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must provide Inspectors with the use of photocopiers, computers, and other equipment necessary to copy such records, if subject AN Facilities have access to such equipment. If Inspectors deem that photocopying or other reproduction of records is necessary, but subject AN Facilities do not have access to necessary photocopying/reproduction equipment, Inspectors must be permitted to take original copies of pertinent records out of the subject AN Facilities for duplication and prompt return.

(b) *Records availability during on-site inspections and audits for which the department has provided less than 24 hours notice.* Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must make all records required to be maintained by this Part available to Inspectors as quickly as possible upon the commencement of an on-site inspection and audit. Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must make such records available, at a maximum, within four hours of the commencement of an on-site inspection and audit. Inspectors must be provided with the use of photocopiers, computers, and other equipment necessary to copy such records, if subject AN Facilities have access to such equipment. If Inspectors deem that photocopying or other reproduction of records is necessary, but subject AN Facilities do not have access to necessary photocopying/reproduction equipment, Inspectors must be permitted to take original copies of pertinent records out of the subject AN Facilities for duplication and prompt return.

(c) *Records availability for remote inspections and audits for which the department has provided at least 24 hours notice.* Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must remotely submit any and all records requested by the Department under this Part to the Department by the time prescribed in the Department's notice.

(d) *Records availability for remote inspections and audits for which the department has provided less than 24 hours notice.* Each AN Facility and its AN Facility Representative(s) and Designated AN Facility POC must remotely submit all records requested by the Department under this Part to the Department as quickly as possible after, and in no case more than four hours later than, receipt of the Department's notice.

Subpart F—Civil Penalties

§ 31.600 Orders Assessing Civil Penalty, generally.

When the Assistant Secretary determines that any person or entity has violated any provision or provisions of this Part, the Assistant Secretary may issue an Order Assessing Civil Penalty against such person or entity making such person or entity liable to the United States for a civil penalty of not more than $50,000 per violation of this part.

§ 31.605 Setting civil penalty amounts.

In determining the amount of a civil penalty, the Assistant Secretary will consider: The nature and circumstances of the violation(s) underlying the civil penalty; the history of prior violations by the person or entity determined to have committed the violation underlying the civil penalty; the ability to pay of the person or entity determined to have committed the violation underlying the civil penalty; the ability to continue to do business of the person or entity determined to have committed the violation underlying the civil penalty; and any other matters that the Assistant Secretary determines that justice requires.

§ 31.610 Procedures for issuing Orders Assessing Civil Penalty.

(a) At a minimum, each Order Assessing Civil Penalty will be signed by the Assistant Secretary, dated, and include as to each person or entity subject to such Order Assessing Civil Penalty:

(1) The name, address, and (where applicable) AN Registered User Number of such person or entity;

(2) A listing of the provision(s) of this Part alleged to have been violated;

(3) A statement of facts upon which the alleged instances of violation are based;

(4) A statement of the amount of the civil penalty assessed;

(5) A statement of the date by which such person or entity must pay the civil penalty assessed, and a statement of the date by which such person or entity may file a Notice for Application for Review pursuant to Subpart G of this Part, as an alternative to civil penalty payment;

(6) A statement of the means by which such person or entity may file a Notice for Application for Review pursuant to Subpart G of this Part; and

(7) A statement of the means by which payment may be made.

(b) The Assistant Secretary may establish procedures for issuance of Orders Assessing Civil Penalty.

(c) Each person or entity subject to an Order Assessing Civil Penalty must comply with the terms of such Order Assessing Civil Penalty by the date specified in such Order Assessing Civil Penalty unless such person or entity has filed a timely Notice for Application for Review under Subpart G of this Part.

(d) An Order Assessing Civil Penalty issued under this section becomes a final agency action when the time specified in such Order Assessing Civil Penalty to file a Notice for Application for Review has passed without such filing.

Subpart G—Adjudications and Appeals

§ 31.700 Neutral adjudications, generally.

(a) Any person or entity against whom an Order Assessing Civil Penalty has been issued is entitled to a hearing and adjudication, by a Presiding Officer, on any issue of material fact relevant to any civil penalty issued against such person or entity under this Part.

(b) A Presiding Officer will issue an Initial Decision on any material issue related to an Order Assessing Civil Penalty before any such issue is reviewed on appeal pursuant to 6 CFR 31.735.

§ 31.705 Appointment of Presiding Officers.

(a) Immediately upon the filing of any Notice for Application for Review under 6 CFR 31.710, the Secretary shall appoint an attorney, who is employed by the Department and who has not performed any investigative or prosecutorial function with respect to the matter, to act as a neutral adjudications officer or Presiding Officer for the compilation of a factual

record and the recommendation of an Initial Decision for each Proceeding.

(b) Notwithstanding paragraph (a) of this section, the Secretary may appoint one or more attorneys who are employed by the Department and who do not perform any investigative or prosecutorial function with respect to this subpart, to serve generally in the capacity as Presiding Officer(s) for such matters pursuant to such procedures as the Secretary may hereafter establish.

§ 31.710 Commencement of Adjudication Proceedings.

(a) Any person or entity against whom an Order Assessing Civil Penalty has been issued may institute proceedings to review the propriety of such civil penalty by filing a Notice for Application for Review specifying that such person or entity requests a hearing and adjudication.

(b) Each person or entity requesting a hearing and adjudication must serve each Notice for Application for Review and all subsequent filings on the Office of the General Counsel.

(c) Each Notice for Application for Review must be accompanied by all appropriate legal memoranda, declarations, affidavits, other documents and other evidence supporting the position asserted by the person or entity requesting a hearing and adjudication.

(d) The Assistant Secretary will file and serve a Response, accompanied by all appropriate legal memoranda, declarations, affidavits, other documents and other evidence supporting the position asserted by the Assistant Secretary, within 14 calendar days of the filing and service of the Notice for Application for Review and all supporting papers.

§ 31.715 Prohibition on ex parte communications during adjudication.

(a) At no time after the designation of a Presiding Officer for a proceeding and prior to the issuance of a Final Decision on an appeal pursuant to 6 CFR 31.735(e) will the designated Presiding Officer, or any person who will advise that official in the decision on the matter, discuss ex parte the merits of the proceeding with any interested person outside the Department, with any Department official who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person.

(b) If, after the designation of a Presiding Officer and prior to the issuance of a Final Decision on an appeal pursuant to 6 CFR 31.375(e), the designated Presiding Officer, or any person who will advise that official in the decision on the matter, receives from or on behalf of any party, by means of an ex parte communication, information which is relevant to the decision of the matter and to which other parties have not had an opportunity to respond, a summary of such information will be served on all other parties, who will have an opportunity to reply to the ex parte communication within a time set by the designated Presiding Officer.

(c) The consideration of classified or Sensitive But Unclassified information or materials pursuant to an in camera procedure does not constitute a prohibited ex parte communication for purposes of this subpart.

§ 31.720 Burden of proof.

The Assistant Secretary bears the initial burden of proving the facts necessary to support the challenged Order Assessing Civil Penalty at every proceeding instituted under this subpart.

§ 31.725 Hearing and adjudication procedures.

(a) Following filing and receipt of Notice for Application for Review and Response, the assigned Presiding Officer will conduct scheduling conferences or issue scheduling orders as appropriate; accept or order pre-hearing memoranda, motions, and briefings as appropriate; and order discovery as appropriate.

(b) Any hearing and adjudication will be held as expeditiously as possible in the county, parish, or incorporated city of residence of the person or entity filing the Notice for Application for Review instituting the hearing and adjudication, at a precise location to be determined by the assigned Presiding Officer, or, with the consent of such person or entity, at any other location conducive to a prompt presentation of any necessary testimony or other proceedings.

(c) Videoconferencing and teleconferencing may be used where appropriate at the discretion of the assigned Presiding Officer.

(d) Each party offering the affirmative testimony of a witness must present that testimony by declaration, affidavit, or other sworn statement submitted in advance as ordered by the assigned Presiding Officer.

(e) Any witness presented for examination will be asked to testify under oath or affirmation.

(f) The hearing and adjudication will be recorded verbatim.

(g) A person or entity may appear to be heard on his own behalf or through any counsel of his choice.

(h) A person or entity, individually or through counsel, may offer relevant and material information including written direct testimony which that person or entity believes should be considered in opposition to the Order Assessing Civil Penalty at issue.

(i) A person or entity, individually or through counsel, may conduct cross-examination as may be specifically allowed by the assigned Presiding Officer for a full determination of relevant facts.

§ 31.730 Completion of adjudication procedures.

(a) The assigned Presiding Officer will close and certify the record of the adjudication promptly upon the completion of the hearing and upon the submission of post-hearing briefs, if any are ordered by the assigned Presiding Officer.

(b) The assigned Presiding Officer will issue an Initial Decision based on the certified record, and the decision will be subject to appeal pursuant to 6 CFR 31.735.

(c) An Initial Decision will become a final agency action on the expiration of the time for an appeal pursuant to 6 CFR 31.735.

(d) An Initial Decision will specify the time by which the subject person or entity must pay the ordered civil penalty, or the Presiding Officer's modification of such penalty, if any. Such deadline will be stayed, however, during the pendency of any appeal pursuant to 6 CFR 31.735.

§ 31.735 Appeals.

(a) *Right to appeal.* The Assistant Secretary, or any person or entity having received an Initial Decision under this Subpart, has the right to appeal to the Under Secretary acting as a neutral appeals officer.

(b) *Procedure for appeals.* (1) The Assistant Secretary, or any person or entity who has received an Initial Decision under this Subpart, may institute an appeal by filing a Notice of Appeal with the Office of the General Counsel.

(2) A Notice of Appeal must be filed within seven calendar days of the service of the Presiding Officer's Initial Decision. Where the Assistant Secretary initiates an appeal, the Assistant Secretary will serve a copy of this Notice of Appeal on the appellee.

(3) An Initial Decision is stayed from the timely filing of a Notice of Appeal until the Under Secretary issues a Final Decision.

(4) The appellant must file a Brief with the Office of the General Counsel within 28 calendar days of the filing of

the Presiding Officer's Initial Decision. Where the Assistant Secretary initiates an appeal, the Assistant Secretary will serve a copy of this Brief on the appellee.

(5) The appellee must file its/his/her Opposition Brief with the Office of the General Counsel within 28 calendar days of the filing of the appellant's Brief. Where the Assistant Secretary is an appellee, the Assistant Secretary will serve a copy of this Opposition Brief on the appellant.

(c) *Expedited appeals.* The Under Secretary may provide for expedited appeals for appropriate matters.

(d) *Ex parte communications.* (1) At no time after the filing of a Notice of Appeal and prior to the issuance of a Final Decision on an appeal pursuant to 6 CFR 31.735(e) will the Under Secretary, his designee, or any person who will advise that official in the decision on the matter discuss ex parte the merits of the proceeding with any interested person outside the Department, with any Department official who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person.

(2) If, after the filing of a Notice of Appeal and prior to the issuance of a Final Decision on an appeal pursuant to 6 CFR 31.375(e), the Under Secretary, his designee, or any person who will advise that official in the decision on the matter receives from or on behalf of any party, by means of an ex parte communication, information which is relevant to the decision of the matter and to which other parties have not had an opportunity to respond, a summary of such information will be served on all other parties, who will have an opportunity to reply to the ex parte communication within a time set by the Under Secretary or his/her designee.

(3) The consideration of classified or Sensitive But Unclassified information or materials pursuant to an in camera procedure does not constitute a prohibited ex parte communication for purposes of this subpart.

(e) *Final decisions.* The Under Secretary will issue a Final Decision and serve it upon the parties. A Final Decision made by the Under Secretary constitutes final agency action.

(f) *Conduct of appeals.* The Secretary may establish procedures for the conduct of appeals pursuant to this subpart.

Subpart H—Other

§ 31.800 State law preemption.

Subject to subtitle J, the laws of any State are preempted to the extent that such laws are inconsistent with this part or with subtitle J, except that this section shall not preempt any State law that provides additional protection against the acquisition of ammonium nitrate by terrorists or the use of ammonium nitrate in explosives in acts of terrorism or for other illicit purposes, as determined by the Secretary.

Janet Napolitano,

Secretary.

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Part III

Securities and Exchange Commission

17 CFR Parts 240 and 249

Large Trader Reporting; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 240 and 249

[Release No. 34–64976; File No. S7–10–10]

RIN 3235–AK55

Large Trader Reporting

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting new Rule 13h–1 and Form 13H under Section 13(h) of the Securities Exchange Act of 1934 (''Exchange Act'') to assist the Commission in both identifying, and obtaining trading information on, market participants that conduct a substantial amount of trading activity, as measured by volume or market value, in the U.S. securities markets. Rule 13h–1 will require a ''large trader,'' defined as a person whose transactions in NMS securities equal or exceed 2 million shares or $20 million during any calendar day, or 20 million shares or $200 million during any calendar month, to identify itself to the Commission and make certain disclosures to the Commission on Form 13H. Upon receipt of Form 13H, the Commission will assign to each large trader an identification number that will uniquely and uniformly identify the trader, which the large trader must then provide to its registered broker-dealers. Such registered broker-dealers will then be required to maintain records of two additional data elements in connection with transactions effected through accounts of such large traders (the large trader identification number, and the time transactions in the account are executed). In addition, the Commission is requiring that such broker-dealers report large trader transaction information to the Commission upon request through the Electronic Blue Sheets systems currently used by broker-dealers for reporting trade information. Finally, certain registered broker-dealers subject to the Rule will be required to perform limited monitoring of their customers' accounts for activity that may trigger the large trader identification requirements of Rule 13h–1.

The large trader reporting requirements are designed to provide the Commission with a valuable source of useful data to support its investigative and enforcement activities, as well as facilitate the Commission's ability to assess the impact of large trader activity on the securities markets, to reconstruct trading activity following periods of unusual market volatility, and to analyze significant market events for regulatory purposes.

DATES: *Effective Date:* October 3, 2011.

Compliance Dates: December 1, 2011 for the requirement on large traders to identify to the Commission pursuant to Rule 13h–1(b). April 30, 2012 for broker-dealers to maintain records, report, and monitor large trader activity pursuant to Rule 13h–1(d), (e), and (f).

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I. Introduction

The Commission's ability to analyze market movements and investigate the causes of market events in an expeditious manner, as well as efficiently conduct investigations of regulated entities and bring and prosecute enforcement matters, is influenced greatly by its ability to promptly and efficiently identify significant market participants across equities and options markets and collect uniform data on their trading activity. Though the large trader rule was proposed before the market events of May 6, 2010, that incident has emphasized the importance of enhancing the Commission's ability to quickly and accurately analyze and investigate major market events, and has highlighted the need for an efficient and effective mechanism for gathering data on the most active market participants.[1]

[1] On May 6, 2010, the prices of many U.S.-based equity products experienced an extraordinarily rapid decline and recovery. *See* Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues at *http://www.sec.gov/news/studies/2010/marketevents-report.pdf*. *See also* Preliminary Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging

The large trader reporting requirements that the Commission is now adopting will enhance, in the near term, the Commission's ability to identify, and collect information on the trading activity of, the most significant participants in the U.S. markets.[2]

On April 23, 2010, Proposed Rule 13h–1 was published for public comment in the **Federal Register**.[3] The Commission received 87 comment letters on the proposal from investment advisers, broker-dealers, institutional and individual investors, industry trade groups, and other market participants.[4] Commenters generally supported the goals of the proposal. As further discussed below, however, some commenters expressed concern about certain aspects of the proposal and recommended that the proposal be amended or clarified in certain respects. Some commenters also expressed concern with the proposed rule in light of the separate proposal to establish a consolidated audit trail.[5]

After careful review and consideration of the comment letters, the Commission is adopting Rule 13h–1 (the ''Rule'') and Form 13H (the ''Form'') with certain modifications, discussed below, to address concerns expressed by some commenters.

II. Background

The Commission is in the process of conducting a broad and critical look at U.S. market structure in light of the rapid development in trading technology and strategies. The Commission has proposed several rulemakings, including this rulemaking, to address potential discrete issues in the current market structure.[6] In addition, last year the Commission published a concept release on equity market structure designed to further the Commission's broad review of whether its rules have kept pace with, among other things, changes in trading technology and practices.[7]

The Commission's ongoing review of market structure comes at a time when U.S. securities markets are experiencing a dynamic transformation, reflecting a decades-long evolution from a market structure with primarily manual trading to a market structure with primarily automated trading. Electronic trading allows ever-increasing volumes of securities transactions to take place across an expanding multitude of trading systems that together constitute the U.S. national market system. Competition among markets has facilitated the ability of large institutional and other professional market participants to employ sophisticated trading methods to trade electronically on multiple venues simultaneously in huge volumes with great speed.[8]

Given the dramatic changes to the securities markets, the Commission believes it is appropriate to exercise its authority under Section 13(h) of the Exchange Act[9] to establish large trader reporting requirements. Large trader reporting requirements will provide the Commission with a valuable source of useful data that will greatly enhance the Commission's ability to identify large market participants, and collect and analyze information on their trading activity.

Currently, to support its regulatory and enforcement activities, the Commission collects transaction data from registered broker-dealers through the Electronic Blue Sheets (''EBS'') system.[10] The EBS system generally is used to analyze trading in a small sample of securities over a limited period of time.[11] However, the EBS system lacks two important data elements that limit its usefulness when reconstructing market activity: Time of execution for the order and a uniform identifier to identify the participant that effected the trade.[12] In addition, EBS does not require, as is contemplated by the large trader reporting system outlined by Section 13(h)(2) of the Exchange Act,[13] that transaction data be available on a next-day basis, which can delay the Commission's ability to promptly collect and begin to analyze transaction data following a market event. The Commission's adoption today of Rule 13h–1 and Form 13H is designed to address certain of these limitations of EBS.

A. The Market Reform Act

Following declines in the U.S. securities markets in October 1987 and

Regulatory Issues at *http://www.sec.gov/sec-cftc-prelimreport.pdf.*

[2] Longer term, the Commission expects the consolidated audit trail proposal, if adopted, to further enhance access by the Commission and self-regulatory organizations to order and trade data from all market participants. *See* Securities Exchange Act Release No. 62174 (May 26, 2010), 75 FR 32556 (June 8, 2010) (proposed Consolidated Audit Trail) (File No. S7–11–10) (''CAT Proposal''). As discussed further below, the aspects of the large trader reporting rule that enable the collection of information on the identity of large traders, including a large trader identification number, would not be replicated or superseded by the consolidated audit trail and would remain as a key tool in the Commission's oversight of the markets for the long term.

[3] *See* Securities Exchange Act Release No. 61908 (April 14, 2010), 75 FR 21456 (April 23, 2010) (File No. S7–10–10) (''Proposing Release'').

[4] Copies of comments received on the proposal are available on the Commission's Web site at *http://www.sec.gov/comments/s7-10-10/s71010.shtml.*

[5] *See* CAT Proposal, *supra* note 2.

[6] *See, e.g.,* Securities Exchange Act Release Nos. 60684 (September 18, 2009), 74 FR 48632 (September 23, 2009) (proposal to eliminate flash order exception from Rule 602 of Regulation NMS) (File No. S7–21–09); 60997 (November 13, 2009), 74 FR 61208 (November 23, 2009) (proposal to regulate non-public trading interest) (File No. S7–27–09); 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (File No. S7–03–10) (adopting Rule 15c3–5 under the Exchange Act addressing risk management controls for brokers or dealers with market access); and CAT Proposal, *supra* note 2.

[7] *See* Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (File No. S7–02–10).

[8] Market analysts have offered a wide range of estimates for the level of activity attributable to one category of large traders—high frequency traders—but these estimates typically exceed 50% of total volume. *See, e.g.,* Preliminary Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, May 18, 2010, at Appendix A–11 (''Estimates of HFT volume in the equity markets vary widely, though they often are 50 percent of total volume or higher.''). *See also, e.g.,* Scott Patterson and Goeffrey Rogow, What's Behind High-Frequency Trading, Wall Street Journal, August 1, 2009 (''High frequency trading now accounts for more than half of all stock-trading volume in the U.S.''); and Rob Iati, The Real Story of Trading Software Espionage, Advanced Trading, July 10, 2009, *available at http://advancedtrading.com/algorithms/showArticle.jhtml?articleID=218401501* (high frequency trading accounts for 73% of U.S. equity trading volume). One source estimates that, five years ago, that number was less than 25%. *See* Rob Curran & Geoffrey Rogow, Rise of the (Market) Machines, Wall Street Journal, June 19, 2009, *available at http://blogs.wsj.com/marketbeat/2009/06/19/rise-of-the-market-machines/.* The trend is clear that high frequency traders now play an increasingly prominent role in the securities markets.

[9] 15 U.S.C. 78m(h), as adopted by the Market Reform Act of 1990 (''Market Reform Act''), PL 101–432 (HR 3657), October 16, 1990.

[10] *See* 17 CFR 240.17a–25 (Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers).

[11] The difficulties in collecting trading data for analysis are reflected in the Commission's preliminary report on the events of May 6, 2010. *See* Preliminary Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, May 18, 2010, at 1 (''The reconstruction of even a few hours of trading during an extremely active trading day in markets as broad and complex as ours—involving thousands of products, millions of trades and hundreds of millions of data points—is an enormous undertaking. Although trading now occurs in microseconds, the framework and processes for creating, formatting, and collecting data across various types of market participants, products and trading venues is neither standardized nor fully automated. Once collected, this data must be carefully validated and analyzed.'')

[12] The shortcomings of the EBS system were noted by the Senate Committee on Banking, Housing and Urban Affairs in the Senate Report accompanying the Market Reform Act of 1990. *See* Senate Report, *infra* note 14, at 48.

[13] *See* 15 U.S.C. 78m(h)(2) (''* * * records shall be available for reporting to the Commission * * * on the morning of the day following the day the transactions were effected * * *.'').

October 1989, Congress recognized that the Commission's ability to analyze the causes of a market crisis was impeded by its lack of authority to gather trading information.[14] To address this concern, Congress passed the Market Reform Act, which, among other things, amended Section 13 of the Exchange Act to add new subsection (h), authorizing the Commission to establish a large trader reporting system under such rules and regulations as the Commission may prescribe.[15]

The Market Reform Act authorizes the Commission to require large traders to self-identify to the Commission.[16] In addition, the Market Reform Act authorizes the Commission to collect from registered brokers or dealers information on the trading activity of large traders.[17] In particular, the Commission is authorized to require every registered broker or dealer to make and keep records with respect to securities transactions of large traders that equal or exceed a certain ''reporting activity level'' and report such transactions upon request of the Commission.[18]

B. Rule 17a–25 and the Enhanced EBS System

In 2001, the Commission adopted Rule 17a–25 to enhance the EBS system and facilitate the Commission's ability to collect electronic transaction data to support its investigative and enforcement activities.[19] Rule 17a–25 enhanced the EBS system in three primary areas. First, it requires broker-dealers to submit to the Commission securities transaction information responsive to a Blue Sheets request in *electronic* format.[20] Second, the rule modified the EBS system to take into account evolving trading strategies used primarily by institutional and professional traders. Specifically, the rule requires broker-dealers to supply three additional data elements (beyond what was required under Exchange Act Rules 17a–3 and 17a–4)—namely, prime brokerage identifiers,[21] average price account identifiers,[22] and depository institution identifiers [23]—to assist the Commission in aggregating securities transactions by entities trading through multiple accounts at more than one broker-dealer.[24] Finally, the rule requires broker-dealers to update their contact person information to provide the Commission with up-to-date information necessary for the

[14] The legislative history accompanying the Market Reform Act also noted the Commission's limited ability to analyze the causes of the market declines of October 1987 and 1989. *See generally* Senate Comm. on Banking, Housing, and Urban Affairs, Report to accompany the Market Reform Act of 1990, S. Rep. No. 300, 101st Cong. 2d Sess. (May 22, 1990) (reporting S. 648) (''Senate Report'') and House Comm. on Energy and Commerce, Report to accompany the Securities Market Reform Act of 1990, H.R. Rep. No. 524, 101st Cong. 2d Sess. (June 5, 1990) (reporting H.R. 3657) (''House Report'').

[15] *See* Market Reform Act, *supra* note 9.

[16] Section 13(h) of the Exchange Act defines a ''large trader'' as ''every person who, for his own or an account for which he exercises investment discretion, effects transactions for the purchase or sale of any publicly traded security or securities by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of a national securities exchange, directly or indirectly by or through a registered broker or dealer in an aggregate amount equal to or in excess of the identifying activity level.'' *See* 15 U.S.C. 78m(h)(8)(A). The term ''identifying activity level'' is defined in Section 13(h) as ''transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule or regulation, specifying the time interval during which such transactions shall be aggregated.'' *See* 15 U.S.C. 78m(h)(8)(C). The ''identifying activity level'' is set forth in paragraph (a)(7) of new Rule 13h–1.

[17] *See* Senate Report, *supra* note 14, at 4, 44, and 71. In this respect, though self-regulatory organization (''SRO'') audit trails provide a time-sequenced report of broker-dealer transactions, those audit trails do not identify the large trader in a uniform manner on an inter-market basis. Accordingly, the Commission is not presently able to utilize existing SRO audit trail data to accomplish the objectives of the Market Reform Act.

[18] *See* 15 U.S.C. 78m(h)(2). Section 13(h) also provides the Commission with authority to determine the manner in which transactions and accounts should be aggregated, including aggregation on the basis of common ownership or control. *See* 15 U.S.C. 78m(h)(3). The term ''reporting activity level'' is defined in Section 13(h)(8)(D) of the Exchange Act to mean ''transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule, regulation, or order, specifying the time interval during which such transactions shall be aggregated.'' *See* 15 U.S.C. 78m(h)(8)(D). The ''reporting activity level'' is set forth in paragraph (a)(8) of new Rule 13h–1.

[19] *See* Securities Exchange Act Release No. 44494 (June 29, 2001), 66 FR 35836 (July 9, 2001) (S7–12–00) (final rulemaking) (''Rule 17a–25 Release''); and 42741 (May 2, 2000), 65 FR 26534 (May 8, 2000) (proposed rulemaking) (''Rule 17a–25 Proposing Release''). In the late 1980s, the Commission and the SROs worked together to develop and implement a system with a uniform electronic format, commonly known as the EBS system, to replace the process by which the Commission would request and collect securities trading records from broker-dealers through mailed questionnaires (known as ''blue sheets''). *See* Rule 17a–25 Proposing Release, 65 FR at 26534–35.

In the 1990s, the Commission twice proposed to use its authority under Section 13(h) of the Exchange Act to establish a large trader reporting system; neither system was adopted. In 1991, the Commission proposed a large trader reporting system that would have required large traders to disclose to the Commission their accounts and affiliations, and would have imposed recordkeeping and reporting requirements on broker-dealers with respect to the activity of their large trader customers. *See* Securities Exchange Act Release No. 29593 (August 22, 1991), 56 FR 42550 (August 28, 1991) (S7–24–91) (''1991 Proposal''). The 1991 proposal included an ''identifying activity level,'' the triggering level at which large traders would be required to identify themselves to the Commission, of aggregate transactions during any 24-hour period that equals or exceeds either 100,000 shares or fair market value of $4,000,000, or any transactions that constitute program trading. *See* 1991 Proposal, 56 FR at 42551. Commenters expressed concerns about the initial proposal, including about the definition of large trader, the identifying activity level, the duty to supervise compliance, its costs, as well as various technical aspects of reporting. *See* Securities Exchange Act Release No. 33608 (February 9, 1994), 59 FR 7917 (February 17, 1994) (S7–24–91) (''1994 Reproposal''). In 1994, the Commission again proposed a large trader reporting system which, among other things, included an increased ''identifying activity level'' of aggregate transactions in publicly traded securities effected during a calendar day where the account is located that are equal to or greater than the lesser of 200,000 shares and fair market value of $2,000,000 or fair market value of $10,000,000. *See* 1994 Reproposal.

[20] *See* 17 CFR 240.17a–25. Rule 17a–25 requires submission of the same standard customer and proprietary transaction information that SROs request in connection with their market surveillance and enforcement inquiries. For a proprietary transaction, the broker-dealer must include the following information: (1) Clearing house number or alpha symbol used by the broker-dealer submitting the information; (2) clearing house number(s) or alpha symbol(s) of the broker-dealer(s) on the opposite side to the trade; (3) identifying symbol assigned to the security; (4) date transaction was executed; (5) number of shares, or quantity of bonds or options contracts, for each specific transaction; whether each transaction was a purchase, sale, or short sale; and, if an options contract, whether open long or short or close long or short; (6) transaction price; (7) account number; (8) identity of the exchange or market where each transaction was executed; (9) prime broker identifier; (10) average price account identifier; and (11) the identifier assigned to the account by a depository institution. For customer transactions, the broker-dealer also is required to include the customer's name, customer's tax identification number, customer's address(es), branch office number, registered representative number, whether the order was solicited or unsolicited, and the date the account was opened. If the transaction was effected for a customer of another member, broker, or dealer, the broker-dealer must include information on whether the other party was acting as principal or agent on the transaction.

[21] The Commission requires prime brokerage identifiers to avoid double-counting of transactions where EBS submissions reflect the same trade by both the executing broker-dealer and the broker-dealer acting as the prime broker. *See* Rule 17a–25 Release, *supra* note 19, 66 FR at 35838.

[22] Some broker-dealers use ''average price accounts'' as a mechanism to buy or sell large amounts of a given security for their customers. Under this arrangement, a broker-dealer's average price account may buy or sell a security in small increments throughout a trading session and then transfer the accumulated long or short position to one or more accounts for an average price or volume-weighted average price after the market close. Similar to prime brokerage identifiers, the Commission requires average price account identifiers to avoid double-counting where the EBS submission reflects the same transaction for both the firm's average price account and the accounts receiving positions from the average price account. *See* Rule 17a–25 Release, *supra* note 19, 66 FR at 35838–39.

[23] The inclusion of a depository identifier in EBS reports was designed to expedite the Commission's efforts to aggregate trading when conducting complex trading reconstructions. *See* Rule 17a–25 Release, *supra* note 19, 66 FR at 35839.

[24] *See* 17 CFR 240.17a–25(b).

Commission to direct EBS requests to the appropriate staff.[25]

C. The Need for Large Trader Reporting

While Rule 17a–25 enhanced the Commission's EBS system and improved the Commission's ability to obtain electronic transaction records, it is insufficient to accomplish the objectives of Section 13(h) of the Exchange Act and is inadequate with respect to the Commission's efforts to monitor the impact of large trader activity on the securities markets.[26] The limitations of the current EBS system also inhibit the usefulness of EBS data in the conduct of the Commission's investigative and enforcement activities.

Most importantly, the data gathered by the EBS system does not include information on the time of the trade or the identity of the trader.[27] While the Commission may be able to use price as a proxy for execution time when reconstructing trading history in a particular security when, in limited cases, the trading therein is characterized by a generally unidirectional trend in price, such analysis does not necessarily produce accurate results, is resource intensive, and hinders the Commission's ability to promptly analyze data.[28] Further, information to identify each large trader in a uniform manner across markets is necessary to permit the Commission to fully track and analyze large trader activity, especially with respect to large traders that trade through multiple accounts at multiple broker-dealers or trade using direct market access arrangements.[29]

The Commission believes that the Rule is necessary because, as noted above, large traders appear to be playing an increasingly prominent role in the securities markets. For example, market observers have offered a wide range of estimates for the percent of overall volume attributable to one potential subcategory of large trader—high frequency traders—which is typically estimated at 50% or higher of total volume.[30] The large trader reporting requirements will provide the Commission a mechanism for obtaining the information necessary to reliably identify the most significant of these market participants and promptly and efficiently obtain information on their trading on a market-wide basis.

As the events of May 6, 2010 demonstrated, the reconstruction of trading activity during an extremely active trading day in our high-speed, diverse, and complex markets can involve an enormous undertaking to collect uniform data and analyze thousands of products, millions of trades, and hundreds of millions (and perhaps even billions) of data points.[31] While the large trader reporting requirements will not be a panacea for the challenges facing the Commission in its oversight of the markets, it represents an important enhancement to the Commission's capabilities to uniformly identify large traders and quickly obtain information on their trading activity in a manner that can be implemented expeditiously by leveraging an existing reporting system.

This release first gives a general description of Rule 13h–1 as adopted and then discusses the specific provisions of the Rule and the accompanying Form 13H on which large traders will self-identify to the Commission. It then discusses the recordkeeping, reporting, and monitoring responsibilities applicable to registered broker-dealers under the Rule. The release highlights various comments received and outlines the modifications made to the Rule and Form 13H from the Proposing Release in light of these comments.

D. Relation to Consolidated Audit Trail Proposal

Separately from this rulemaking, the Commission has also proposed to establish a consolidated audit trail for equities and options that would capture customer and order event information for most orders in NMS securities across all markets, from time of order inception through routing, cancellation, modification, or execution.[32] For the reasons described below, the large trader requirements adopted today, while important, are much more limited in terms of their scope, objectives, and implementation burden than the consolidated audit trail system that is still under consideration by the Commission.

The recordkeeping and reporting provisions of Rule 13h–1 are based substantially on existing Rule 17a–25 and the Commission's current EBS system, and therefore can be implemented more expeditiously and at less cost than the consolidated audit trail proposal. In particular, the large trader reporting requirements would involve an enhancement to the existing EBS system for broker-dealers to add two new data fields (*i.e.,* LTID and execution time of the trade) and require that transaction records be available for reporting on a next-day basis. In addition, the large trader reporting requirements would involve a new web-based form (Form 13H) that large traders would file and update to identify themselves to the Commission. Accordingly, through relatively modest steps, the large trader reporting requirements will address the Commission's near-term need for access to more information about large traders and their trading activities and begin to improve the Commission's ability to analyze such information. In contrast, the consolidated audit trail, if adopted, would require the development over a longer time frame of significant technology systems to collect and consolidate more extensive information regarding orders, trades, and customers in a uniform manner across all markets and other execution venues.

In addition, key aspects of the large trader reporting requirements adopted today are not addressed by, and would continue to be necessary upon any adoption of, a consolidated audit trail. In particular, Rule 13h–1 requires large traders to self-identify to the Commission by filing Form 13H, obtain a unique LTID, and provide that LTID to their broker-dealers. As noted above, this requirement will assist the Commission in efficiently identifying and obtaining trading and other information on market participants that conduct a substantial amount of trading activity. Further, these requirements are compatible with, rather than duplicative of, the Commission's proposed consolidated audit trail. Indeed, by incorporating the LTID information into the data elements that would be

[25] This provision was designed to address the recurring problem of frequent staff turnover and re-organizations at broker-dealers to ensure the Commission directs EBS requests to the appropriate personnel. *See* Rule 17a–25 Release, *supra* note 19, 66 FR at 35839.

[26] *See* 15 U.S.C. 78m(h)(1).

[27] As noted above, the Commission has proposed to establish a consolidated audit trail for equities and options that would collect and consolidate detailed information about orders entered and trades executed on any exchange or in the over-the-counter market. *See* CAT Proposal, *supra* note 2. The large trader reporting requirements we are adopting today are designed to address the near-term need for access to more information about large traders and their activities.

[28] In addition, Rule 17a–25 does not require EBS data to be available for reporting to the Commission on a next-day basis, and therefore the Commission may face delays when obtaining transaction data.

[29] The Commission has separately adopted a rule that addresses direct market access to exchanges and alternative trading systems ("ATSs"). *See* Securities and Exchange Act Release Nos. 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (File No. S7–03–10) (final rule) and 61379 (January 26, 2010), 75 FR 4713 (January 29, 2010) (proposed rule).

[30] *See supra* note 8 (discussing analyst estimates of high frequency trader activity).

[31] *See supra* note 11 (citing from the Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, May 18, 2010).

[32] *See* CAT Proposal, *supra* note 2.

reported through the consolidated audit trail, the large trader requirements adopted today will ultimately enrich the data that would be available for regulatory purposes through the proposed consolidated audit trail system.

The Commission recognizes the concerns of some commenters that unnecessary overlap or duplication between large trader reporting requirements and a consolidated audit trail could result in additional costs and other burdens for market participants.[33] Although for the reasons described above the Commission believes that adoption of the large trader rule is appropriate at this time, it expects to take these concerns into account in considering the scope and requirements of any consolidated audit trail.

III. Description of Adopted Rule and Form

The large trader reporting requirements have two primary components: (1) Registration of large traders with the Commission; and (2) recordkeeping, reporting, and monitoring duties imposed on registered broker-dealers that service large trader customers. First, large traders must register with the Commission by filing and periodically updating Form 13H on which they will provide contact information and report general information concerning their business, regulatory status, affiliates, governance, and broker-dealers. Upon receipt of an initial Form 13H, the Commission will assign and issue to a large trader a unique LTID. The large trader must disclose its LTID to all of its broker-dealers and must highlight to each such broker-dealer all accounts to which the LTID applies. Second, registered broker-dealers must: (1) Maintain specified records of transactions effected by or through accounts of large traders as well as Unidentified Large Traders;[34] (2) electronically report all transactions by such persons to the Commission upon request utilizing the existing EBS infrastructure; and (3) perform a limited monitoring function to promote awareness of and foster compliance with the Rule. The specific requirements applicable to large traders and registered broker-dealers are discussed in detail below.

A. Large Traders

1. Large Trader Status

Rule 13h–1(a)(1) defines a ''large trader'' as ''any person that: (i) Directly or indirectly, including through other persons controlled by such person, exercises investment discretion over one or more accounts and effects transactions for the purchase or sale of any NMS security for or on behalf of such accounts, by or through one or more registered broker-dealers, in an aggregate amount equal to or greater than the identifying activity level; or (ii) voluntarily registers as a large trader by filing electronically with the Commission Form 13H.'' This definition is substantially the same as the proposed definition of the term but, as discussed below, takes into account comments received on that proposed definition.

a. Who should register as a large trader?

The definition of large trader is designed to focus on the ultimate parent company of an entity or entities that employ or otherwise control the individuals that exercise investment discretion. Accordingly, the definition of large trader, in conjunction with the provision that allows the parent company to comply with the self-identification requirement on behalf of its subsidiaries,[35] is intended to allow the Commission to gather information about the primary institutions that conduct a large trading business while at the same time mitigating the burden of the Rule by focusing the filing requirement on persons and entities that control large traders.

The Commission received several comments relating to the proposed scope of the term large trader.[36] The various components of the definition of large trader, and the comments received about them, are discussed below. In addition, one commenter questioned whether the Rule would violate the Fourth and Fifth Amendments of the U.S. Constitution.[37] The Commission believes that the Rule does not infringe upon these rights.[38]

i. Persons Who Exercise Investment Discretion

A large trader is any person that ''directly or indirectly, including through other persons controlled by such person, exercises investment discretion over one or more accounts * * *''[39] Rule 13h–1(a)(4) provides that the term ''investment discretion'' has ''the same meaning as in Section 3(a)(35) of the Securities Exchange Act of 1934.'' One commenter objected to this definition, asserting that the definition under the Exchange Act is ''fraught with ambiguities'' and therefore would be unhelpful in ''deciphering investment relationships.''[40] The commenter offered no alternative definition, but asked for clarification regarding what is meant by ''exercising investment discretion.'' The definition of ''investment discretion'' in Section 3(a)(35) of the Exchange Act encompasses a person who is ''authorized to determine what securities or other property shall be purchased or sold by or for the account'' as well as a person that ''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 * * *.''[41] Rule 13h–1(a)(4) further specifies that a ''person's employees who exercise investment discretion within the scope of their employment are deemed to do so on behalf of such person.'' To the extent that an entity employs a natural person that individually, or collectively with others, meets the definition of a ''large trader,'' then, for purposes of Rule 13h–1, the entity that controls that person or those persons would be a large trader.

One commenter recommended excluding regulated investment

[33] *See, e.g.,* Managed Funds Association Letter and Wellington Management Letter.

[34] *See* new Rule 13h–1(a)(9) (defining the term ''Unidentified Large Trader'') and discussion *infra* at Section III.B.

[35] The rule, however, also permits compliance by a controlled person. *See* new Rule 13h–1(b)(3)(ii), which is discussed *infra* at Section III.A.2.a.0.

[36] *See, e.g.,* SIFMA Letter at 7; American Benefits Council Letter at 2–3; and Financial Engines Letter at 2–4.

[37] *See* Harris Letter.

[38] The United States Court of Appeals for the District of Columbia Circuit has found that disclosure to the Commission does not constitute a regulatory taking. *See Full Value Advisors LLC* v. *SEC,* 633 F.3d 1101, 2011 WL 339210 (DC Cir. February 4, 2011). The Commission believes that the same reasoning applies in the case of Rule 13h–1. The Commission also, to the extent permissible under the federal securities laws, holds and treats as confidential certain legally-protected proprietary information that it receives in connection with its regulatory activities. Further, the Commission believes that Rule 13h–1 is an appropriate exercise of its regulatory authority and does not violate the Fourth Amendment.

[39] *See* new Rule 13h–1(a)(1).

[40] *See* SIFMA Letter at 17, n.23.

[41] 15 U.S.C. 78c(a)(35). *See also* Rule 13h–1(a)(3) (defining control the term ''control'' to mean ''the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of securities, by contract, or otherwise. For purposes of this rule only, any person that directly or indirectly has the right to vote or direct the vote of 25% or more of a class of voting securities of an entity or has the power to sell or direct the sale of 25% or more of a class of voting securities of such entity, or in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25% or more of the capital, is presumed to control that entity'').

companies and pension fund managers from the definition of large trader.[42] The Commission notes that an investment company is a legal structure for the management of pooled assets by an investment adviser. As such, the investment adviser exercises investment discretion over the assets of the investment company. Accordingly, the Commission believes that the requested exclusion for regulated investment companies is not necessary because an investment adviser to an investment company, like a pension manager to a pension fund, is the entity that exercises investment discretion either solely or in connection with other investment managers. The large trader reporting requirements are designed to collect information about important market participants that exercise investment discretion. Accordingly, the Commission is not adopting the suggested exclusion for pension fund managers because it would undermine the purposes of the large trader reporting requirements. The Commission is adopting the definition of investment discretion substantially as proposed.

ii. Parent Company Level Registration

As noted above, the definition of large trader is designed to focus on the ultimate parent company of an entity or entities that employ or otherwise control the individuals that exercise investment discretion. A number of commenters recommended limiting the application of the Rule to include as large traders only those entities that directly exercise investment discretion.[43] These commenters also raised a number of concerns with the proposal's focus on placing the filing requirement at the parent company level.

After considering the comments received, the Commission has determined to adopt the scope of the large trader identification requirement substantially as proposed. While the Rule's broader focus on identification at the parent company level may provide less detailed information on the activity of individual traders within a large trader complex,[44] it nevertheless will facilitate the Commission's ability to collect data on the full extent of trading by persons and entities under common control. The Commission also notes that, in addition to promoting the Commission's regulatory and enforcement responsibilities, the large trader reporting requirements also are intended to facilitate the reconstruction of market events using transaction data. To that end, parent company-level aggregation should enhance the Commission's ability to reconstruct trading by significant market participants by providing the Commission with access to a broad set of useful data.

Some commenters noted that parent companies of financial services organizations often do not take part in the day-to-day activities of their subsidiaries and, as a result, employees of those parent companies are not knowledgeable about the trading activities of their subsidiaries and would not be able, for example, to readily respond to any follow-up questions from the Commission.[45] The Commission notes that, to determine whether a parent company is a large trader, the aggregate trading activity of all entities controlled by the parent company must be collected. Controlled entities need produce only aggregated statistics in summary form, which would be added together at the parent level to determine whether the identifying activity level has been met. If it has, then the parent company is a large trader and will be required to provide information about itself and its affiliates, unless all of its affiliates comply on its behalf pursuant to Rule 13h–1(b)(3)(ii). Further, the Commission believes that the additional identifying information requested on Form 13H could most easily be collected by a parent company employee from the entities controlled by the parent company. The Commission expects that communication of the basic information required by the Form, as well as aggregate securities transactions to determine whether the identifying activity threshold has been met, between a parent company and the entities that it controls should not be burdensome and should not require the development of new integrated trading systems. To the extent a parent company is unaware of its subsidiaries' aggregate transaction levels and other basic identifying information, the Commission believes that implementing control systems to capture such information will be consistent with appropriate risk management considerations.

One commenter expressed concern that the filing by a parent company of a Form 13H on behalf of its subsidiaries may give the impression that its firewalls are weak.[46] The Commission does not believe a parent company's duty to determine whether it is a large trader based on aggregated statistics that summarize the trading activity of its subsidiaries should violate or undermine the effectiveness of existing firewalls. The Rule only requires that a parent company aggregate and consider daily and monthly share volume and dollar value of certain transactions in NMS securities effected by the persons it controls. The Rule does not require the disclosure of any particular transaction information (*e.g.,* the identity of or additional information on the securities bought or sold). Rather, persons need only produce a total figure of the relevant transactions for which they exercised investment discretion. The parent company would then aggregate together those figures when measuring its overall activity against the applicable trading activity threshold.

(a) Use of LTID Suffixes

Some commenters questioned the utility of the information that would be collected if large traders were identified at the parent company level, including whether grouping together persons who make trading decisions independently of each other would cloud the Commission's view when investigating for certain trading behavior, such as manipulation.[47] As an alternative, some commenters suggested that the Rule permit, but not compel, identification at the parent company level.[48] Another commenter suggested eliminating the requirement that an LTID be affixed to the trades of affiliates that do not independently qualify as large traders.[49] With respect to the concern about the Commission's ability to identify trading activity within a large trader with more particularity, as discussed further below,[50] Item 4(d) of Form 13H permits a large trader to assign LTID suffixes to sub-identify persons, divisions, groups, and entities under its control. For example, a large trader may choose to assign a suffix to each independent division within the large trader. Use of suffixes to identify various sub-groups within a large trader could facilitate a large trader's ability to accurately and efficiently track with more particularity the trading for which it exercises investment discretion, and as a consequence, could facilitate the ability

[42] *See* SIFMA Letter at 18.

[43] *See* Financial Information Forum Letter at 5; Managed Funds Association Letter at 3; T. Rowe Price Letter at 2; and SIFMA Letter at 9.

[44] For purposes of the large trader reporting rule, references to the ''large trader complex'' is intended to refer to all entities under the control of the large trader parent company.

[45] *See, e.g.,* Prudential Letter at 3.

[46] *See* Prudential Letter at 3.

[47] *See, e.g.,* Prudential Letter at 2 and Investment Adviser Association Letter at 4.

[48] *See* Investment Company Institute Letter at 6 and Prudential Letter at 3.

[49] *See* Investment Adviser Association Letter at 5.

[50] *See infra* Section III.A.3.0.

of a large trader to respond to any Commission request to further identify accounts or disaggregate trading data, as discussed below. To the extent large traders utilize LTID suffixes, the need for the Commission to contact large traders for assistance in further identifying their accounts should be diminished. Accordingly, the Commission encourages large traders to utilize LTID suffixes.

The Commission notes that, ultimately, the information limitation identified by commenters may be addressed by the Commission's separate rulemaking for a consolidated audit trail which, if adopted as proposed, would require collection of information about the person with investment discretion for each order as well as information to identify the beneficial owner for each order.[51] In the meantime, allowing a parent company to comply on behalf of related entities should provide the Commission with important information at lower cost to the industry, by reducing the complexity and burdens of the large trader reporting requirements—such as those proposed by the Commission during the 1990s—that could have required reporting at multiple levels within a control group. At the same time, this provision addresses the Commission's near-term need for access to more information about large traders and their trading activities, which will enable the Commission to more efficiently analyze market events.

(b) Control and Minority-Owned Entities

With respect to which persons under a parent company's control should be considered in determining the parent company's large trader status, Rule 13h–1(a)(3) defines ''control'' (and the terms ''controlling,'' ''controlled by,'' and ''under common control with'') as ''the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of securities, by contract, or otherwise. For purposes of this rule only, any person that directly or indirectly has the right to vote or direct the vote of 25% or more of a class of voting securities of an entity or has the power to sell or direct the sale of 25% or more of a class of voting securities of such entity, or in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25% or more of the capital, is presumed to control that entity.''

One commenter stated that including minority-owned entities would be problematic because it may be difficult for a large trader to obtain the information from a minority-owned entity that would be necessary for it to complete Form 13H.[52] Furthermore, according to this commenter, the minority-owned entity may resist attaching the large trader's LTID to its trades.[53] Another commenter suggested attributing to a large trader only the activity of majority-owned entities that are actual operating subsidiaries, and not attributing the activity of more remote, partially-owned entities.[54] After considering the comments received, the Commission has decided to adopt as proposed the definition of control solely for purposes of this Rule. In particular, the Commission continues to believe that a minority shareholder holding at least 25% of the ownership interests of an entity would be in a position to exercise the influence necessary to secure that entity's cooperation in facilitating a large trader's compliance with the federal securities laws, especially given that all that this entails for the controlled entity would be providing its registered broker-dealers with the large trader's LTID and the accounts to which it applies. In addition, if the controlled entity refuses to cooperate, the large trader itself may be able to notify the broker-dealer of its LTID. The Commission also continues to believe that the definition of control is appropriate and will allow the Commission to identify, and obtain trading data from, controlled persons for whom a large trader is in a position to materially influence the investment decisions made by such person.[55]

b. Identifying Activity Level

Rule 13h–1(a)(7) defines the term ''identifying activity level'' as ''aggregate transactions in NMS securities that are equal to or greater than: (1) During a calendar day, either two million shares or shares with a fair market value of $20 million; or (2) during a calendar month, either twenty million shares or shares with a fair market value of $200 million.'' One commenter expressly supported these threshold levels.[56] Another commenter recommended increasing the daily threshold limit to shares with a fair market value of $100 million during any calendar day.[57] Others advocated increased thresholds, but did not identify a particular level or provide empirical support for their recommendations.[58]

Some commenters thought that the proposed identifying activity level would capture infrequent traders, who they believe should not attract regulatory interest under a large trader reporting rule.[59] The Commission notes that nothing in Section 13(h) of the Exchange Act suggests that the Commission should focus its attention only on those large traders that are frequent traders. The statute permits the Commission to monitor the impact on the securities markets of securities transactions involving a substantial volume or a large fair market value or exercise value. While frequency of trading is one factor that the Commission considered in defining who is a large trader, it was not the only factor. In explaining why it proposed to exclude certain transactions, the Commission stated that the proposed exclusions were designed to exclude certain small and otherwise infrequent traders from the definition of a large trader, but also stated: ''the proposed excepted transactions are not effected with an intent that is commonly associated with an arm's length purchase or sale of securities in the secondary market and therefore do not fall within the types of transactions that are characterized by the exercise of investment discretion.''[60] To the extent that a market participant trades only infrequently, but does so in large volume in the course of exercising investment discretion, the Commission seeks to identify that participant as a

[51] *See* CAT Proposal, *supra* note 2, 75 FR at 32572.

[52] *See* Prudential Letter at 3. The Commission notes that proposed Form 13H would have required a large trader to identify its accounts and disclose for each account the LTID of any unaffiliated large trader with whom it shares investment discretion. As discussed below, the Commission has not adopted the provisions in the Form relating to the identification of accounts, and, as a consequence, a large trader would not need to obtain the LTID of any unaffiliated large trader for purposes of completing the Form.

[53] *See* Prudential Letter at 3.

[54] *See* SIFMA Letter at 18.

[55] The Commission considered other thresholds for control and determined that a 25% threshold would be the appropriate level for purposes of new Rule 13h–1. As discussed in the Proposing Release, the Commission notes that the definition of control is similar to the definition of control contained in Form 1 (Application for Registration or Exemption from Registration as a National Securities Exchange). *See* Proposing Release, *supra* note 3, 75 FR at 24161. *Cf.* Rule 19h–1(f)(2) under the Exchange Act, 17 CFR 240.19h–1(f)(2) (featuring a 10% threshold with respect to the right to vote 10% or more of the voting securities or receive 10% or more of the net profits).

[56] *See* T. Rowe Price Letter at 2.

[57] *See* Financial Engines Letter at 7.

[58] *See, e.g.,* Managed Funds Association Letter at 2.

[59] *See* Investment Adviser Association Letter at 10; Howard Hughes Medical Institute Letter at 1; Managed Funds Association Letter at 2; and SIFMA Letter at 8.

[60] *See* Proposing Release, *supra* note 3, 75 FR at 21463.

large trader. Nevertheless, the Commission recognizes the filing burden that could be placed on a trader whose activity only on very rare occasions meets the identifying activity threshold. These persons may be eligible for Inactive Status, a concept which is discussed below.

The Commission continues to believe that the identifying activity level is appropriate because it will identify large traders that engage in a substantial amount of trading activity relative to overall market volume—specifically, approximately 0.01% of the daily volume and market value of trading in NMS securities.[61] Moreover, as discussed below, Inactive Status is available for large traders whose trading activity reaches the identifying activity level infrequently.

Transactions Counted Towards the Identifying Activity Level. As proposed, Rule 13h-1(a)(6) defined the term ''transactions'' as ''all transactions in NMS securities, including exercises or assignments of option contracts,'' except for certain specifically enumerated transactions.[62] To more closely align this definition with the aggregation provisions contained in paragraph (c) of the Rule, the Commission is adopting a revised definition that provides that the term ''transaction'' means ''all transactions in NMS securities, excluding exercises or assignments of option contracts,'' except for certain specifically enumerated transactions.[63] As noted in the Proposing Release, for purposes of the identifying activity level with respect to options, only purchases and sales of the options themselves, and not transactions in the underlying securities pursuant to exercises or assignments of such options, need to be counted. However, for purposes of the identifying activity level, the volume and value of options purchased or sold would be determined by reference to the securities underlying the option.[64] Thus, the Rule is intended to focus on the trading of options and the potential impact of those options positions on the underlying markets. By excluding purchases and sales pursuant to exercises or assignments, the Rule avoids double-counting towards the applicable identification threshold. The revised definition of ''transaction'' more closely aligns it with the explanation of the aggregation provision applicable to options provided in the Proposing Release. The Commission believes that the definition as adopted is consistent with Section 13(h)(1) of the Exchange Act, and will advance its stated goals, including ''monitoring the impact on the securities markets of securities transactions involving a substantial volume or a large fair market value or exercise value * * *''[65]

In addition, the Commission received comments on the enumerated exclusions from the term ''transaction.''[66] As indicated in the Proposing Release, the proposed exceptions from the term ''transaction'' were designed to exclude certain transactions from the identifying activity level calculation because they are not effected with an intent that is commonly associated with the arm's-length trading of securities in the secondary market and therefore do not fall within the types of transactions that are characterized by the exercise of investment discretion.[67] One commenter requested that the Commission allow registered broker-dealers to include the excluded transactions when reporting transaction data to the Commission pursuant to Rule 13h–1(e).[68] The commenter explained that registered broker-dealers' existing infrastructure may not collect sufficient data to allow the broker-dealer to exclude excepted transactions when reporting transaction data to the Commission. In response to this comment, the Commission is adopting a definition of ''transaction'' in the Rule to reflect its limited application, as discussed in the Proposing Release. Specifically, to underscore that the enumerated transactions are excluded from the definition of transaction *only* for the purpose of determining who is a large trader, the Commission is adopting the introductory portion of the second sentence of Rule 13h–1(a)(6) to provide that: ''The term transaction or transactions means all transactions in NMS securities, including exercises or assignments of option contracts. *For the sole purpose of determining whether a person is a large trader,* the following transactions are excluded from this definition * * *.'' Accordingly, a person need not count trading activity that falls within one of the listed categories of excluded transactions when it determines whether it meets the applicable identifying activity threshold. However, in response to a Commission request for data, a broker-

[61] *See* Proposing Release, *supra* note 3, 75 FR 21463–64. An ''NMS security'' is ''any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.'' 17 CFR 242.600(b)(46). The term refers generally to exchange-listed securities, including equities and options.

[62] Specifically, under the proposal, the following would not be counted as ''transactions'' for purposes of the proposed Rule: (i) Any journal or bookkeeping entry made to an account in order to record or memorialize the receipt or delivery of funds or securities pursuant to the settlement of a transaction; (ii) any transaction that is part of an offering of securities by or on behalf of an issuer, or by an underwriter on behalf of an issuer, or an agent for an issuer, whether or not such offering is subject to registration under the Securities Act of 1933, provided, however, that this exemption shall not include an offering of securities effected through the facilities of a national securities exchange; (iii) any transaction that constitutes a gift; (iv) any transaction effected by a court appointed executor, administrator, or fiduciary pursuant to the distribution of a decedent's estate; (v) any transaction effected pursuant to a court order or judgment; (vi) any transaction effected pursuant to a rollover of qualified plan or trust assets subject to Section 402(a)(5) of the Internal Revenue Code; or (vii) any transaction between an employer and its employees effected pursuant to the award, allocation, sale, grant, or exercise of a NMS security, option or other right to acquire securities at a pre-established price pursuant to a plan which is primarily for the purpose of an issuer benefit plan or compensatory arrangement.

[63] As noted in the Proposing Release, the aggregation provisions in paragraph (c) are designed to require market participants to use a ''gross up'' approach in calculating their activity levels. Accordingly, offsetting or netting transactions among or within accounts, even for hedged positions, would be added to a participant's activity level in order to show the full extent of a trader's purchase and sale activity. This approach reflects the fact that substantial trading activity has the potential to impact the market regardless of the trader's net position. *See* Proposing Release, *supra* note 3, 75 FR at 21464.

[64] *See id.* For example, 50,000 shares of XYZ stock and 500 XYZ call options would count as aggregate transactions of 100,000 shares in XYZ (*i.e.,* $50,000 + 500 \times 100 = 100,000$). With respect to index options, the market value would be computed by multiplying the number of contracts purchased or sold by the market price of the options and the applicable multiplier. For example, if ABC Index has a multiplier of 100, a person who purchased 200 ABC call options for $400 would have effected aggregate transaction of $8 million (*i.e.,* $200 \times 400 \times 100 = \$8,000,000$). Transactions in index options are not required to be ''burst'' into share equivalents for each of the underlying component equities.

[65] *See* 15 U.S.C. 78m(h)(1).

[66] *See, e.g.,* American Benefits Council Letter; Financial Engines Letter; Howard Hughes Medical Institute Letter; and SIFMA Letter.

[67] *See* Proposing Release, *supra* note 3, 75 FR at 21463 (''The proposed exclusions are designed to exempt certain small and otherwise infrequent traders from the definition of a large trader as well as activity that is not characterized by active investment discretion or is associated with capital raising or employee compensation. Specifically, the Commission preliminarily believes that the proposed excepted transactions are not effected with an intent that is commonly associated with an arm's-length purchase or sale of securities in the secondary market and therefore do not fall within the types of transactions that are characterized by the exercise of investment discretion. While a large enough one-time transaction in the proposed categories could have an impact on the market, the Commission would be able to obtain information on that trade through other means, including the EBS system. The Commission preliminarily believes that the benefit to the Commission of identifying such person as a large trader solely through one of the enumerated excepted transactions would not be justified by the costs that would be imposed on the person and their registered broker-dealer that accompany meeting the definition of large trader.'')

[68] *See* Financial Information Forum Letter at 3.

dealer must report all transactions that it effected through the accounts of a large trader without excluding any transactions listed in Rule 13h–1(a)(6).

In the Proposing Release, the Commission requested comment about whether any of the proposed exclusions from the definition of transaction should be eliminated or whether any other types of transactions should be excluded.[69] While no commenter recommended eliminating any of the excluded transactions, several commenters suggested the Commission consider additional exclusions. For example, some commenters suggested excluding all or some transactions effected on behalf of defined contribution plans.[70] The Commission does not believe that a blanket exclusion for transactions effected on behalf of defined contribution plans is warranted because such trades are effected through the exercise of investment discretion and are within the scope of activity contemplated by the statute. Instead, the Commission believes it is appropriate to provide additional guidance regarding the application of the Rule to transactions effected on behalf of defined contribution plans. As highlighted by commenters, investment discretion may be exercised on behalf of defined contribution plans differently, depending on the particular structure of the plan. For example, in some defined contribution plans, participants select their own investments from among the choices offered by their employer.[71] A trustee then effects the transactions pursuant to the instructions it receives from the plan participants. For purposes of determining who is a large trader, the participants in such plans are the ones who exercise investment discretion over the transactions that are effected on their behalf. In such plans, the Commission does not view the trustee as exercising investment discretion over the transactions for purposes of the Rule.[72] Additionally, solely for purposes of determining who is a large trader pursuant to Rule 13h–1, the Commission considers an employer to not exercise investment discretion merely by establishing investment options for its employees. Other types of defined contribution plans may be structured differently.[73]

Another commenter requested clarification that only the trustee of a retirement plan, not the plan sponsor and other parties involved in plan administration, must self-identify as a large trader.[74] As discussed above, the Rule requires the person who exercises investment discretion over a certain level of transactions to identify as the large trader, which may be the trustee but would generally not be the plan sponsor or administrator if neither exercises investment discretion.

One commenter argued for broadly excluding transactions associated with corporate actions, including mergers and acquisitions and other purchases of assets, self-tenders, buybacks (including Rule 10b–18 buybacks), and certain internal corporate actions (such as journals between accounts within the same entity where there is no change in the beneficial owners).[75] The commenter also recommended excluding stock loans, equity repurchases, and in-kind creations of exchange-traded funds (''ETFs''). As discussed below, the Commission agrees that many, but not all,[76] of the additional categories of transactions identified by the commenter can be excluded for purposes of determining large trader status. Accordingly, the Commission is adopting subparagraph (viii) to Rule 13h–1(a)(6), which excludes the following additional transactions for purposes of calculating the identifying activity level: ''any transaction to effect a business combination, including a reclassification, merger, consolidation, or tender offer subject to Section 14(d) of the Securities Exchange Act; an issuer tender offer or other stock buyback by an issuer; or a stock loan or equity repurchase agreement.''

Consistent with the views outlined in the Proposing Release, the Commission believes that these additional categories of transactions are effected for materially different reasons than those commonly associated with the arm's-length trading of securities in the secondary market and the associated exercise of investment discretion. For example, transactions to effect a business combination, as well as an issuer tender offer or other stock buyback by an issuer, reflect fundamental corporate decision-making that involves matters much broader than those traditionally associated with trading activity in NMS securities. Such transactions are discrete corporate actions to effect the acquisition of a business or to manage the extent of the distribution of an issuer's securities. Further, stock loan and equity repurchase agreements typically are entered into to facilitate short sale transactions or as part of a larger financing transaction, and not as part of an investment decision traditionally associated with trading activity in NMS securities. Accordingly, the Commission believes it appropriate to not count these transactions for the purpose of determining whether a person meets the identifying activity level contained in the definition of large trader.

For purposes of the identifying activity level for large trader reporting, the Commission believes that it is appropriate to count transactions effected in the secondary market to assemble, or dispose of, securities that are transferred between an ''authorized participant'' and an ETF. An authorized participant is a trader that, on its own behalf or on behalf of others, presents securities (or other assets) to an ETF in order to create ETF shares or receives securities (or other assets) from an ETF in connection with the redemption of ETF shares. Among other reasons, authorized participants engage in such creations and redemptions to take advantage of arbitrage opportunities resulting from differences in the market prices of the securities held by the ETF and the market prices of the ETF shares. The Commission expects that, if authorized participants are large traders, it will be useful to monitor their secondary market trading and to be able to access records of their trading activity across broker-dealers. However, the Commission does not believe that the actual transfer of the basket of securities between an authorized participant and an ETF should be counted for purposes of large trader reporting. Accordingly, the Commission will count toward the

[69] *See* Proposing Release, *supra* note 3, 75 FR at 21472.

[70] *See* Financial Engines Letter at 7 and American Benefits Council Letter at 2 (suggesting exempting significant repositioning of portfolio balances by very large defined benefit plans; investment lineup changes by defined contribution retirement plan sponsors; and plan activity in connection with acquisitions and divestitures of businesses which may precipitate a large movement of participants out of a plan).

[71] *See* American Benefits Council Letter at 2.

[72] The Commission expects that few individual defined contribution plan participants will effect aggregate transactions greater than or equal to the identifying activity level, and the Commission therefore expects that generally they will not meet the definition of large trader.

[73] The Commission notes that, pursuant to Section 13(h)(6) of the Exchange Act and new Rule 13h–1, the Commission may by order exempt, upon specified terms and conditions or for stated periods, any person or class of persons or any transaction or class of transactions from the provisions of this rule to the extent that such exemption is consistent with the purposes of the Exchange Act. *See* new Rule 13h–1(g), which is discussed *infra* at Section III.0.

[74] *See* American Benefits Council Letter at 2–3.

[75] *See* SIFMA Letter at 8.

[76] For example, the Commission is not making any changes in response to the suggestion of one commenter to essentially exempt all transactions effected on behalf of organizations dedicated to a charitable purpose. *See* Howard Hughes Medical Institute Letter. *See also infra* text accompanying note 255 and the subsequent discussion.

identifying activity level trading activity in the secondary market that relates to the acquisition or disposition of securities in connection with, for example, the creation or redemption of ETF shares, but not the transfer of such securities between an authorized participant and an ETF.[77]

c. Voluntary Registration

One commenter suggested that the Commission allow a person to register voluntarily as a large trader as that person nears the applicable trading activity threshold in order to reduce its need to actively monitor its trading levels.[78] The Commission agrees with the commenter that the ability to voluntarily register will mitigate the monitoring burden on market participants who expect to effect transactions equal to or greater than the identifying activity level at some point in the future. Accordingly, the Commission is adopting: (1) A definition of large trader that includes those persons who voluntarily register as large traders; and (2) changes to Form 13H to require a large trader to indicate in its initial filing with the Commission whether it has chosen to voluntarily register. Any such person that elects to voluntarily file will be treated as a large trader for purposes of the Rule, and will be subject to all of the obligations of a large trader under the Rule, notwithstanding the fact that the person had not effected the requisite level of transactions at the time it registered as a large trader.

2. Duties of a Large Trader

Pursuant to Rule 13h–1, a large trader must self-identify by filing Form 13H with the Commission. In addition, a large trader must disclose its LTID to the registered broker-dealers effecting transactions on its behalf and identify for them each account to which it applies.

a. File Form 13H With the Commission

Form 13H provides for six types of filings: Initial Filing; Annual Filing; Amended Filing; Inactive Status; Termination Filing; and Reactivated Status. Each type is discussed below. As reflected in the instructions to the Form, large traders must file all Forms 13H through EDGAR,[79] which is being updated to accept these submissions.[80] Accordingly, large traders will need to have or obtain permission to access and file through EDGAR, and can obtain the necessary access codes, if they do not already have them, by filing a Form ID (Uniform Application for Access Codes to File on EDGAR).[81] Among other things, large traders will be given a Central Index Key (''CIK'') number that uniquely identifies each filer and allows them to submit filings through EDGAR. While Form 13H filings will be processed through the Commission's EDGAR system, once filed, the Form 13H filings will not be accessible through the Commission's Web site or otherwise be publicly available.

i. Initial filings—who must file?

Except as provided below, each large trader must file a Form 13H ''Initial Filing'' to identify itself to the Commission.[82] In complex organizations, more than one related entity can qualify as a large trader. Consider the following example:

- Holding Company owns a 100% ownership interest in Broker-Dealer and Investment Adviser. However, as a practical matter, Holding Company is not engaged in the day-to-day operation of either entity.
- Broker-Dealer owns a 33% ownership interest in Proprietary Trading Firm. None of the firm's other investors own a controlling interest of 25% or more of the firm, and therefore no LTIDs, other than that of Broker-Dealer, would be attached to the trades of Proprietary Trading Firm.
- Investment Adviser owns a 100% ownership interest in Sub-Adviser #1 and Sub-Adviser #2.
- Sub-Adviser #1, on behalf of its clients, exercises investment discretion over accounts and effects transactions in NMS securities on behalf of those accounts in an aggregate amount *greater than* the identifying activity level.
- Sub-Adviser #2, on behalf of its clients, exercises investment discretion over accounts and effects transactions in NMS securities on behalf of those accounts in an aggregate amount *less than* the identifying activity level.
- While engaging in proprietary trading, Broker-Dealer exercises investment discretion over accounts and effects transactions in NMS securities on behalf of those accounts in an aggregate amount *greater than* the identifying activity level.
- The Proprietary Trading Firm effects transactions in NMS securities in an aggregate amount *greater than* the identifying activity level.

All of the identified entities, except Sub-Adviser #2, independently qualify as large traders under the Rule. Therefore, as discussed below, unless these entities rely on the provisions of Rule 13h–1(b)(3)(i), each of them must file separate Forms 13H with the Commission.[83]

Rule 13h–1(b)(3)(i) provides that a large trader shall not be required to separately comply with the requirements of paragraph (b) if a person who controls the large trader complies with all of the requirements under paragraphs (b)(1), (b)(2), and (b)(4) applicable to such large trader with respect to all of its accounts. This provision allows the identification requirement to be pushed up the corporate hierarchy to the parent entity (*i.e.,* Holding Company, in the example above).

Conversely, Rule 13h–1(b)(3)(ii) applies the same principle on a ''top down'' basis, providing that a large trader shall not be required to comply with the requirements of paragraph (b) if one or more persons controlled by such large trader collectively comply with all of the requirements under paragraphs (b)(1), (b)(2), and (b)(4) applicable to such large trader with respect to all of its accounts. A controlling person of one or more large traders (such as Holding Company, in the example above) would be required to comply with all of the requirements of paragraph (b) unless the entities that it controls discharge all of the

[77] Specifically, then, in connection with creation or redemption: (1) Purchases of securities by an authorized participant for the purpose of assembling a basket would count toward an authorized participant's identifying activity level; (2) transfers of those securities by an authorized participant to the ETF would not be counted toward the ETF's identifying activity level; (3) acquisitions of securities by an authorized participant from the ETF would not count toward the authorized participant's identifying activity level; and (4) sales of securities by an authorized participant into the secondary market would count toward the authorized participant's identifying activity level. No transactions effected would be counted toward an ETF's identifying activity level because the ETF would not be exercising investment discretion by creating or redeeming ETF shares.

[78] *See* Investment Company Institute Letter at 7.

[79] One commenter requested that the Commission not require filing of Forms 13H until it has an electronic filing system in place because, while the rule requires electronic filing, the Commission noted the possibility in the Proposing Release that paper filings might be required for a limited period of time. *See* T. Rowe Price Letter at 3. *See also* Proposing Release, *supra* note 3, 75 FR at 21465, n. 80. The Commission shares the concern expressed by the commenter. Form 13H will be a web-based application and will be submitted through EDGAR, a secure web interface, on the applicable compliance date.

[80] *See generally* 17 CFR 232 (Regulation S–T—General Rules and Regulations for Electronic Filings).

[81] An applicant must file Form ID in electronic format via the Commission's EDGAR Filer Management website. *See* 17 CFR 232 (Regulation S–T) and the EDGAR Filer Manual for instructions on how to file electronically, including how to use the access codes.

[82] *See* new Rule 13h–1(b)(1).

[83] *See* new Rule 13h–1(b)(1).

responsibilities of the controlling person under paragraph (b). This provision maintains the focus on the parent company by allowing, for example, a corporate entity to comply on behalf of one or more natural persons who are its controlling owners. In the above example, if Investment Adviser and Broker-Dealer separately register as large traders, Holding Company would not have to separately register as a large trader, assuming that those two entities capture all transactions and accounts controlled by Holding Company.[84] Instead, Investment Adviser and Broker-Dealer would identify (in Item 4(c) of the Form) the other as an affiliate filing separately, and identify Holding Company as their affiliate's parent company on their respective Form 13H filings. In this way, the Commission will be able to tell that the entities are under the common control of Holding Company, and the Commission could assign LTIDs that reference their common parent.

When must an Initial Filing be submitted? A large trader must file a Form 13H Initial Filing promptly after effecting aggregate transactions equal to or greater than the identifying activity level.[85] The Commission solicited [86] and received comments about the Initial Filing deadline.[87] Some commenters requested additional guidance on what constitutes ''promptly.'' [88] One commenter recommended that the Commission specify a 10-day filing deadline.[89] In contrast, another commenter suggested that the Commission define promptly as without delay, but in no circumstances later than 30 days after the trader qualifies as a large trader.[90] Another commenter assumed that promptly means within 30 days.[91] The Commission continues to believe that ''promptly'' is an appropriate standard because it emphasizes the need for filings to be submitted without delay to ensure their timeliness while affording filers a limited degree of flexibility.[92] However, given the requests for additional guidance, the Commission believes that under normal circumstances, it would be appropriate for Initial Filings (and Reactivated Filings, discussed below) to be filed within 10 days after the large trader effects aggregate transactions equal to or greater than the identifying activity level.[93]

ii. Annual Filings

All large traders must submit an Annual Filing within 45 days after the end of each full calendar year,[94] except that large traders on Inactive Status (discussed below) are not required to file Form 13H while they are on Inactive Status.[95]

iii. Amended Filings

If any of the information contained in a Form 13H filing becomes inaccurate for any reason, a large trader must file an Amended Filing no later than the end of the calendar quarter in which the information became stale.[96] While not required by the Rule, a large trader may voluntarily file an amended filing more frequently than quarterly at its discretion. A large trader on ''Inactive Status'' (described below) is not required to file any Amended Filings while it is on Inactive Status.

iv. Inactive Status

Rule 13h–1(b)(3)(iii) permits a large trader who has not effected aggregate transactions at any time during the previous full calendar year in an amount equal to or greater than the identifying activity level to obtain inactive status by filing for ''Inactive Status'' through a Form 13H submission.[97] Inactive Status would be effective upon such filing.

Inactive status is designed to reduce the burden on infrequent traders who may trip the threshold on a particular occasion but do not regularly trade at sufficient levels to support continued status as a large trader. In particular, Inactive Status is designed to minimize the impact of the Rule on natural persons who infrequently effect transactions of a magnitude that otherwise warrant the added regulatory requirements under the Rule. Inactive status relieves the large trader from the requirement to file amended Forms 13H. It also permits the large trader to request that its broker-dealers stop maintaining records of its transactions by LTID.

The Commission requested comment about whether the proposed provision for Inactive Status is appropriate and sufficient and whether it should be modified or eliminated.[98] The Commission did not receive any comments regarding Inactive Status.[99] The Commission is adopting this provision, as proposed.

v. Reactivated Status

A person on Inactive Status who effects aggregate transactions that are equal to or greater than the identifying activity threshold must file a ''Reactivated Status'' Form 13H promptly after effecting such transactions.[100] Upon filing for Reactivated Status, the person once again would be subject to the filing requirements of Rule 13h–1 and must inform its broker-dealers of its reactivated status.[101] The Commission

[84] In this case, Investment Adviser would be responsible for providing its LTID to each registered broker-dealer that effects transactions on its behalf, on behalf of Sub-Adviser #1, or on behalf of Sub-Adviser #2. Additionally, Broker-Dealer would be responsible for providing its LTID to each registered broker-dealer that effects transactions on its behalf or on behalf of Proprietary Trading Firm. Further, Investment Adviser would be responsible for identifying each of the accounts to which its LTID applies, which would include the accounts of Sub-Adviser #1, Sub-Adviser #2, and Broker-Dealer would be responsible for identifying each of the accounts to which its LTID applies, which would include the accounts of Proprietary Trading Firm.

[85] *See* new Rule 13h–1(b)(1).

[86] *See* Proposing Release, *supra* note 3, 75 FR at 21472.

[87] *See* Investment Adviser Association Letter at 9; SIFMA Letter at 18–19; and Investment Company Institute Letter at 10.

[88] *See, e.g.,* Investment Adviser Association Letter at 9 and SIFMA Letter at 18–19.

[89] *See* Investment Adviser Association Letter at 9.

[90] *See* Investment Company Institute Letter at 10.

[91] *See* SIFMA Letter at 18–19.

[92] *See* Securities Exchange Act Release No. 55857 (June 5, 2007), 72 FR 33564, 33567 (June 18, 2007) (in declining to define the term ''promptly'' as used on Section 15E(b)(1) of the Exchange Act, the Commission stated that whether an amendment is furnished promptly will depend on the facts and circumstances such as the amount of information being updated).

[93] The Commission notes that the guidance provided here regarding the ''promptly'' standard for Form 13H filings is based on the scope of the Form, the expected time to complete the Form, and the required submission thereof through EDGAR, and accordingly this guidance is applicable only to Form 13H filings.

[94] *See* new Rule 13h–1(b)(1)(ii).

[95] *See* new Rule 13h–1(b)(3)(iii).

[96] *See* new Rule 13h–1(b)(1)(iii). The Commission expects that significantly less information will need to be inputted for an Amended Filing and the large trader may have a considerable amount of lead time before the end of the calendar quarter to submit the Amended Filing.

[97] New Rule 13h–1(b)(3)(iii) provides: ''A large trader that has not effected aggregate transactions at any time during the previous full calendar year in an amount equal to or greater than the identifying activity level shall become inactive upon filing a Form 13H and thereafter shall not be required to file Form 13H or disclose its large trader status unless and until its transactions again are equal to or greater than the identifying activity level. A large trader that has ceased operations may elect to become inactive by filing an amended Form 13H to indicate its terminated status.''

[98] *See* Proposing Release, *supra* note 3, 75 FR at 21472.

[99] One commenter, however, asked about broker-dealers' duties regarding inactive persons. *See* Financial Information Forum Letter at 5; *see also infra* text accompanying note 167.

[100] *See* new Rule 13h–1(b)(1)(i). In addition, a person may voluntarily elect to file for Reactivated Status prior to effecting aggregate transactions that are equal to or greater than the identifying activity threshold. As with initial filings, a person may elect to file for Reactivated Status if it did not wish to monitor its trading for purposes of the identifying activity threshold.

[101] New Rule 13h–1(b)(2) provides that each large trader shall disclose to the registered broker-dealers effecting transactions on its behalf its large trader identification number and each account to which it applies. Additionally, a large trader on Inactive

did not receive any comments regarding Reactivated Status. The Commission is adopting this provision, as proposed. In particular, the provision for reactivated status is designed to ensure that a large trader on Inactive Status that becomes active above the identifying activity threshold is once again required to file and update Form 13H and inform its broker-dealers of the need to record its trading activity by its LTID.

vi. Termination Filings

Under Rule 13h–1(b)(3)(iii), a person, under certain narrow circumstances, may permanently end its large trader status by submitting a ''Termination Filing.'' This filing is designed to allow a large trader to inform the Commission that it has terminated operations, and therefore there is no chance of it requalifying for large trader status in the future.[102] Termination status is designed to signal to the Commission to not expect future amended or annual Form 13H filings from that large trader, such as when a large trader dissolves, ceases doing business, or, in some cases, is acquired, as described below.

The Commission believes it may be helpful to provide additional examples to illustrate the narrow circumstances under which a large trader may file a ''Termination Filing.'' These examples also should provide guidance to large traders on how to amend their Forms 13H when a large trader is involved in a merger.

- *Example 1:* A large trader merges into another large trader, resulting in only one entity. The non-surviving large trader would submit a ''Termination Filing'' that specifies the effective date of the merger. The surviving large trader, in an Amended Filing or its next Annual Filing (depending on the effective date of the merger), would update Item 4 to list the non-surviving company as an affiliate that files separately and provide the additional identifying information required in Item 4. Specifically, in the Description of Business and Relationship to the Large Trader fields, the surviving entity would disclose that the non-surviving entity has been acquired and no longer exists as a separate entity. The non-surviving company's market participation identification number (''MPID'') and LTID number (including suffix, if any) should also be listed. Capture of this information will allow the Commission to track the control of the non-surviving entity. In this scenario, the surviving large trader would continue using its LTID.
- *Example 2:* An existing large trader acquires another large trader and the target is maintained as a separate subsidiary. Following the acquisition, the target's trading would need to be tagged with the acquirer's LTID. The acquired subsidiary company may file a Termination Filing so long as all of its trading is tagged with its new parent's LTID.[103] Alternatively, the acquired entity may maintain its original LTID and have its trading tagged with both its original LTID and its new parent's LTID. If a Termination Filing is not made, then both companies would have to amend Items 4 of their Forms 13H to list the other as an affiliate and disclose their affiliate's information, including its MPID and LTID.
- *Example 3:* A large trader is acquired by a company that was not previously a large trader. The new parent company is now a ''large trader'' due to acquiring control of a large trader. Accordingly, the acquirer would file an ''Initial'' Form 13H and obtain a new LTID, which would be used to identify all of its trades and the trades of its affiliates (including its newly acquired large trader subsidiary). The acquired subsidiary company may file a Termination Filing so long as all of its trading is tagged with its new parent's LTID.[104] Alternatively, the acquired entity may maintain its original LTID and have its trading tagged with both its original LTID and its new parent's LTID. If a Termination Filing is not made, then both companies would have to identify the other as an affiliate in Items 4 of their Forms 13H.

The Commission did not receive any comments regarding Termination Filings. The Commission is adopting this provision, as proposed. In particular, the ability to submit Termination Filings will allow the Commission to accurately track only active large traders and will allow large traders that cease operation to formally terminate their filing obligations under Rule 13h–1.

b. Self-Identification to Broker-Dealers

As proposed, Rule 13h–1(b)(2) would have required a large trader to disclose to the registered broker-dealers effecting transactions on its behalf its LTID and each account to which it applies. Second, the provision, as proposed, would have required a large trader to disclose its LTID to all others with whom it collectively exercises investment discretion. The Commission received comments about the latter requirement.[105]

Proposed Schedule 6 to the Form would have required a large trader, in connection with disclosing its brokerage accounts, to also list the LTID(s) of all other large traders that exercise investment discretion over the particular account. To assure that large traders had access to other large traders' LTIDs, the proposed rule would have required large traders to disclose their status to one another. One commenter requested clarification regarding whether a large trader would be obligated to identify unaffiliated large traders only if investment discretion is exercised collectively.[106]

As discussed below, the Commission is not adopting the requirement to disclose brokerage account numbers on Form 13H and instead is requiring a large trader to provide a list of all registered broker-dealers with whom it has an account. Consequently, the requirement to provide the LTID(s) of all other large traders that exercise investment discretion over the particular account now is no longer relevant and is not being adopted. Because the requirement to disclose the information is not being adopted, it would not be necessary for large traders to inform others of their LTIDs, and the Commission is similarly not adopting the proposed requirement for a large trader to disclose its LTID to all others with whom it collectively exercises investment discretion. Accordingly, Rule 13h–1(b)(2), as adopted, requires a large trader to disclose to the registered broker-dealers effecting transactions on its behalf its LTID and each account to which it applies.

Lastly, the requirements that a large trader provide its LTID to all registered broker-dealers who effect transactions on its behalf, and identify each account to which it applies, are ongoing responsibilities that must be discharged promptly. For example, if a subsidiary of a large trader is acquired by another large trader, to the extent that subsidiary effects transactions in NMS securities equal to or greater than the reporting activity level, both large traders must

Status pursuant to paragraph (b)(3) of new Rule 13h–1 must notify broker-dealers promptly after filing for reactivated status with the Commission.

[102] By contrast, as described above, Inactive Status may be only temporary.

[103] If a Termination Filing is elected, the acquirer may wish to use an LTID suffix to separately identify the acquired entity's trading activity.

[104] If a Termination Filing is elected, the acquirer may wish to use an LTID suffix to separately identify the acquired entity's trading activity.

[105] *See, e.g.,* Wellington Management Letter at 5.

[106] *See* Wellington Management Letter at 5–6. Another commenter recommended that the Commission not require investment advisers to identify other advisers of a client account that trade separately and without collaboration in a different custodial account. *See* Investment Company Institute Letter at 10.

promptly notify their registered broker-dealers of the LTID change.[107]

3. Overview of Form 13H

Form 13H is designed to collect basic identifying information about large traders that will allow the Commission to understand the character and operations of the large trader. The Commission solicited [108] and received [109] many comments regarding various aspects of proposed Form 13H. The Commission, for example, received comments requesting clarification regarding certain information required by the proposed Form, as well as suggestions designed to reduce and streamline the reporting burden on large traders.[110] One commenter noted that the large trader reporting rule is only one of many proposed new regulations that are being contemplated by Congress and various federal regulators that would affect commercial banks.[111] The Commission is sensitive to the burdens imposed by the large trader rule.[112] As discussed below, the Commission is incorporating some commenters' suggestions in the Form as adopted, and many of the changes from the proposed version of the Form are intended to reduce further the burdens of the Form. The Commission believes that the version of Form 13H it is adopting today will be less burdensome than the proposed version, most notably because, as discussed further below, it replaces the proposed requirement to provide account numbers with a more general requirement to identify broker-dealers at which the large trader or any of its Securities Affiliates maintains an account.[113] In addition, the Commission is seeking to design the electronic filing system for Form 13H to minimize the filing burden. For example, a selection of previously filed Form 13H submissions, including the most recently submitted version, will be readily accessible so that large traders can simply edit and resubmit the Form when amendments are required. The Commission believes that filing Form 13H in an electronic format will be less burdensome and more efficient for both large traders and the Commission.

The Commission is adopting the Form with some format-driven modifications from the proposed version to better reflect its format as an electronic, rather than paper, filing. For example, the Commission is not adopting the proposed fields that would have required filers of Annual Filings and Amended Filings to identify the Items and Schedules being updated since the Commission will be able to distinguish this information more readily in an electronic filing environment. In addition, the Commission is not adopting the Schedules to the Form, and the information previously contained in the proposed Schedules has been realigned into the body of the Form. References to paper-based ''continuation sheets'' are not being adopted. Similarly, the concept of Schedules, while relevant to a paper-based form, is unnecessary in the context of an all-electronic filing.[114] These and other related non-substantive changes from the proposed version of the Form reflect that the Form will be accessed electronically and filed by large traders exclusively online.

Voluntary Registration. For the reasons discussed above,[115] in response to a comment, the Commission is revising Form 13H from the proposed version of the Form to allow a market participant to register voluntarily as a large trader, even if it has not yet effected transactions equal to or greater than the identifying activity level at the time of filing. Correspondingly, Form 13H requires a large trader to indicate whether its ''Initial Filing'' is voluntary. A large trader that elects to voluntarily file is required to disclose the date upon which it filed the Form, rather than the date on which its trading activity equaled or exceeded the identifying activity level.

Background Information About the Large Trader and Its Authorized Person. Form 13H requires the large trader to provide its mailing address, which may be different than its business address. Additionally, the Form requires that the following information be provided about the Authorized Person (*i.e.,* the natural person authorized to submit the Form 13H on behalf of the large trader): business address, telephone number, facsimile number, and e-mail address. This information was proposed to be required by Schedule 6 of the Form and has been relocated to the introductory section of the Form. Proposed Item 3 of Schedule 4, which would have mandated disclosure of the large trader's principal place of business (if different from the information disclosed on the cover page), has not been adopted. Instead, the requested information has been moved to the beginning of the adopted Form, where both business and mailing addresses are requested. All of this information is necessary for the Commission to identify and contact large traders.

a. Item 1

In Item 1(a) of the Form, the large trader must indicate the types of businesses that it or any of its affiliates engage in: [116] broker or dealer; bank holding company; [117] non-bank holding company; government securities broker or dealer; municipal securities broker or dealer; bank; pension trustee; non-pension trustee; [118] investment adviser to one or more registered investment companies; investment adviser to one or more hedge funds or other funds not registered under the Investment Company Act; insurance company; commodity pool operator; or futures commission merchant. A large trader also may check ''Other'' and disclose other types of financial businesses engaged in by the large trader.

Item 1(b) of the Form requires that the large trader provide the following for itself and each of its Securities Affiliates: a description of the nature of its operations, including a general description of its trading strategies.[119] The instructions provide guidance regarding the level of detail expected.[120]

[107] This responsibility is in addition to the large traders' duty to amend Form 13H pursuant to Rule 13h–1(b)(1).

[108] *See* Proposing Release, *supra* note 3, 75 FR at 21472–73.

[109] *See, e.g.,* Wellington Management Letter at 3–6; American Bankers Association Letter at 2; David L. Goret Letter at 1–3; Anonymous e-mail dated June 22, 2010; and Prudential Letter at 3–4.

[110] *See, e.g.,* SIFMA Letter; Wellington Management Letter; Investment Company Institute Letter; and American Bankers Association Letter.

[111] *See* American Bankers Association Letter at 2.

[112] As discussed *infra* (*see* Section III.0), Section 13(h)(5) of the Exchange Act expressly requires the Commission to take into account, among other things, the costs associated with maintaining information with respect to transactions effected by large traders and reporting such information to the Commission.

[113] As defined in the instructions to Form 13H, ''Securities Affiliate'' means an affiliate of the large trader that exercises investment discretion over NMS securities.

[114] In addition, in response to comments and as discussed in greater detail below, the Commission is revising the scope of the data that would have been collected in the proposed Schedules.

[115] *See supra* at Section III.A.1.0.

[116] Unless otherwise specified, the Form requires information about the large trader that is filing the Form 13H. Typically, the filing large trader would be the large trader's ultimate parent company, which means the person at the highest level of the organizational chart required under Item 4(a) that controls a large trader or multiple large traders.

[117] The use of the term ''Holding Company'' in the proposal has been clarified in the adopted Form by dividing it into two options ''Bank Holding Company'' and ''Non-Bank Holding Company.''

[118] To clarify that all trustees that are large traders would be required to report, the adopted Form includes categories for ''Pension Trustee'' as well as ''Non-Pension Trustee.''

[119] Item 5 of proposed Schedule 4 would have required the large trader to describe the nature of the large trader's business. Form 13H as adopted contains this requirement in Item 1.

[120] For example, a large trader may describe its operations as including an ''investment adviser specializing in fundamental analysis'' or it may describe a broker-dealer as a ''proprietary trader

Collection of this basic descriptive information will allow the Commission to better understand each large trader and will allow the Commission to more carefully tailor requests both to registered broker-dealers for large trader transaction data and, if necessary, to large traders for additional information pursuant to Rule 13h–1(b)(4).

The Commission does not believe that the changes to the Form from the proposed version discussed above are substantive. Instead, the changes are intended to clarify the scope of information elicited by Item 1 and to reflect the fully-electronic nature of the Form.

b. Item 2

Item 2 of the Form requires the large trader to indicate whether it or any of its Securities Affiliates files any other forms with the Commission.[121] If so, Item 2 requires identification of each filing entity, the form(s) filed, and the CIK number.

The Commission is narrowing the scope of Item 2 from the proposal to require the large trader to disclose whether it or any of its affiliates that exercise investment discretion over NMS securities (as distinguished from all of its affiliates) file any forms with the Commission. Additionally, rather than disclosing the filers' Central Registration Depository (''CRD'') Numbers [122] and SEC File Numbers [123] as proposed, Item 2 as adopted requires only disclosure of their CIK numbers.[124]

One commenter objected to the collection of information under proposed Item 2, pointing out that the Commission already has access to this information.[125] The Commission believes that Item 2 is useful because it centralizes information about a large trader's various SEC filing obligations and will thereby allow the Commission to more promptly access records of those filers using their CIK numbers. Especially given the circumscribed scope of Item 2 as adopted, the Commission believes that this requirement will not be unduly burdensome. Further, each large trader should have ready access to this information and be able to summarize it with minimal additional burden.

c. Item 3

Item 3 of the Form requires a large trader to disclose whether it or any of its affiliates is registered with the Commodity Futures Trading Commission (''CFTC'') or regulated by a foreign regulator. If so, the large trader is required to identify each entity and the CFTC registration number or primary foreign regulator, as applicable.

The Commission received one comment about the aspect of proposed Item 3 of the Form that would have required disclosure about bank regulation.[126] The commenter argued that the required information did not further the underlying purpose of the proposal, and recommended that the Commission, to the extent necessary, obtain this information directly from applicable banking regulators instead of from the large trader.[127] In response to this comment, the Commission has significantly narrowed the scope of this item by not adopting the proposed requirement in Item 3(b) of the proposed Form to disclose information on bank regulators. Instead, as mentioned above, the Commission is adopting the requirement to disclose whether the large trader includes a bank [128] or bank holding company. The Commission believes that collection of this basic information will be sufficient to characterize a large trader's operations, and should reduce the burdens of the Form while focusing the collection of information on the securities trading operations of each large trader.

Further, as proposed, Item 3(c) would have required the large trader to disclose whether it or any of its affiliates is an insurance company and identify each such regulated entity and its respective insurance regulators. One commenter recommended limiting Item 3(c) to only the large trader and its large trader affiliates, and suggested that the Form require identification only of their primary regulators.[129] Otherwise, the commenter stated, its list of regulators would include a long list of state insurance regulators.[130] In balancing the benefits of collecting such information against the burden on large traders to provide it, the Commission has decided to not adopt the requirements of proposed Item 3(c). The Commission again notes that Item 1 of Form 13H requires that the large trader disclose whether the large trader includes an insurance company. The Commission believes that collection of this basic information will be sufficient to characterize a large trader's operations, and should reduce the burdens of the Form while focusing the collection of information on the large trader's securities trading operations.

In addition, proposed Item 3(d) would have required the large trader to disclose whether it or any of its affiliates is regulated by a foreign regulator and identify each such regulated entity and all of its foreign regulators. One commenter recommended that the information requested in Item 3(d) only be required of the large trader and its large trader affiliates.[131] It further suggested that the Form require identification only of the primary foreign regulators.[132] The commenter stated that its list of regulators would be very long, as some of its foreign affiliates may have 25 foreign regulators.[133] In balancing the benefits of collecting such information against the burden on large traders to provide it, the Commission is not adopting the requirement as proposed. This adopted item, renumbered as Item 3(b), requires identification only of the primary foreign regulator. Further, the Commission is making the requirement applicable only to the large trader and its Securities Affiliates. In addition, two separate questions proposed on CFTC registration have been combined into one question to streamline the presentation of those items. No substantive change has been made to either question. The Commission believes that the requirement as adopted should not be as burdensome and yet should provide the Commission with access to the basic information it needs to understand the identity and

focusing on statistical arbitrage'' or ''options market maker.''

[121] The title of Item 2 of the adopted Form has been slightly amended; its title is ''Securities and Exchange Commission Filings,'' not ''Securities and Exchange Commission Registration.'' This non-substantive change reflects that registration is not the effect of all forms filed with the Commission.

[122] The CRD is a computerized database that contains information about most brokers, their representatives, and the firms for whom they work.

[123] As discussed above, an SEC File Number is assigned by EDGAR to registrants and others who file materials with the Commission through EDGAR. *See supra* discussion at text accompanying notes 79–81.

[124] CIK numbers, which are assigned to persons that file material with the Commission, are applicable to a broader universe of entities that may be large traders, as opposed to CRD numbers which are only applicable to broker-dealers.

[125] *See* American Bankers Association Letter at 2.

[126] *See id.*

[127] Item 3(b) of the proposed Form would have required the large trader to disclose: (1) Whether it or any of its affiliates is a bank holding company, national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, or foreign bank; if so, the large trader would have been required to identify each such affiliate and its banking regulators.

[128] As adopted, the instructions for Form 13H define the term ''*bank*'' to mean a national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, or foreign bank.

[129] *See* Prudential Letter at 4.

[130] *See id.*

[131] *See id.*

[132] *See id.*

[133] *See id.*

regulatory status of a large trader and its affiliates.

d. Item 4

Item 4(b) of the Form requires information on affiliates of the large trader that exercise investment discretion over NMS securities (*i.e.,* Securities Affiliates).[134] Item 5 of the proposed Form would have required a large trader to identify each affiliate that either exercises investment discretion over accounts that hold NMS securities or that beneficially owns NMS securities. In response to comments received, the Commission is not adopting the requirement to disclose affiliates that merely beneficially own NMS securities.[135] Accordingly, large traders will not have to identify or further describe affiliates who merely beneficially own NMS securities. The Commission believes that limiting the scope of required information to focus on affiliates that exercise investment discretion over NMS securities is appropriate and may reduce reporting burdens, while providing the Commission with important information about affiliates that are engaged in trading activities consistent with the primary focus of the Rule.

Given the narrower scope of affiliates about which information is now requested, the Commission is adopting as Item 4(a) a requirement to attach an organizational chart. At a minimum, the organizational chart must depict the large trader, its parent company (if applicable), all of its Securities Affiliates, and all entities identified in Item 3(a).[136] The organizational chart requirement is intended to help the Commission to quickly understand the affiliate structure of the large trader and should be useful, among other things, in assigning LTIDs and understanding any suffixes that are assigned. At the same time, a narrative description of the relationship between affiliates can also be useful where the relationships are difficult to portray in an organizational chart.[137] Accordingly, as part of Item 4(b), the Commission is requiring a narrative description of the relationship between (1) the large trader; and (2) each Securities Affiliate and each entity identified in Item 3(a).

As part of Item 4(b), the Commission is adopting a requirement that the large trader list its Securities Affiliates and all entities identified in Item 3(a). Additionally, the large trader must describe the business and disclose the MPID (if any) for each of those entities. The MPIDs of Securities Affiliates will be useful to the Commission when analyzing trading data on affiliates identified on the Form. The Commission believes that MPIDs will allow the staff to more carefully tailor requests to registered broker-dealers for large trader trade data, and they may reduce the need for the Commission to send disaggregation requests to a large trader.[138]

Item 4(c) of the Form requires the provision of the LTIDs, including LTID suffixes, for all entities within the large trader that file separately (if any). This requirement is very similar to what was proposed under Item 5. Item 4(c) as adopted, however, expressly requires that a large trader include the LTID suffix (if any) of all identified entities.

Item 4(d) of the Form allows a large trader to assign suffixes to its affiliates. In the Proposing Release, the Commission specified that a large trader could elect to append additional characters (a suffix) to sub-identify particular units that directly control an account.[139] Use of a suffix might be useful, for example, to facilitate a large trader's internal recordkeeping and to facilitate responses to Commission disaggregation requests.[140] The instructions to Item 4(d) of the Form provide guidance on the format for suffixes.[141] A list of the entities within the large trader complex that have been assigned suffixes will help the Commission understand the large trader's use of suffixes and may facilitate the ability of a large trader to track and manage its assigned suffixes.

The Commission believes that the information about large trader affiliates required by Item 4 of the Form is necessary to provide the Commission with the background necessary to understand the character and trading activities of a large trader.

e. Item 5

Item 5 of Form 13H requires information about the governance of the large trader.[142] Item 5(a) mandates disclosure of one or more of the following statuses of the large trader: individual;[143] partnership; limited liability partnership; limited partnership; corporation; trustee; or limited liability company. Additionally, the Form permits the large trader to check ''Other'' and specify a form of organization that is not comparable to any of the enumerated organization types.

Item 5(b) requires the identification of each partner in the large trader partnership and partnership status (*i.e.,* general partner or limited partner).

Item 5(c) requires the identification of each executive officer, director, or trustee of a large trader corporation or trustee. The column title in Item 5(c) reflects the instruction that the large trader identify its Executive Officers.[144]

f. Item 6

Item 6 of Form 13H requires large traders to identify broker-dealers at which the large trader has an account. As proposed, Item 6 would have required large traders to provide information concerning each broker-dealer account through which it or certain of its affiliates trade. The Commission received several comments concerning Schedule 6 to the proposed

[134] Information from proposed Item 5 (on affiliates) has been integrated into Item 4 of the adopted Form, which covers the organization of the large trader generally. This change was intended to consolidate under one Item similar information that is requested on the organization of each large trader.

[135] One commenter suggested that the Commission require identification of only those affiliates that trade in NMS securities. *See* SIFMA Letter at 17.

[136] As long as its organizational chart lists all required entities, a large trader may submit its standard organizational chart that it keeps in the ordinary course of its business. The organizational chart, as part of the Form 13H submission, would be treated as confidential by the Commission. *See infra* Section III.A.3.g (discussing confidentiality).

[137] As proposed, Item 5 of the Form would have collected information about the relationships of affiliates in a list form.

[138] One commenter suggested that assignment of a LTID to track the trades of large traders does not go far enough. *See* GETCO Letter at 3. The commenter recommended that all market participants be required to have and use a unique MPID when entering orders on market centers, either directly or through sponsored market access arrangements. The Commission believes that such an initiative is beyond the scope of this particular rulemaking, which requires *large traders* to provide such information to the Commission. If the Commission were to consider extending such a requirement to other market participants, it would be subject to a separate rulemaking providing interested persons an opportunity to comment.

[139] *See* Proposing Release, *supra* note 3, 75 FR at 21460, n.40.

[140] *See id.* at 75 FR at 21460, n.44.

[141] Specifically, suffixes must have three characters, all of which must be numbers. No letters or special characters may be used in a suffix. Further, the same suffix should not be assigned to more than one entity using the same LTID, and large traders should avoid reusing suffixes.

[142] Information from proposed Schedule 4 (on governance) has been integrated into Item 5 (also on governance). Specifically, the Commission is consolidating proposed Schedule 4 of Form 13H into Item 5 and re-titling it ''Governance of the Large Trader.'' This change was intended to consolidate under one Item similar information concerning the governance of each large trader.

[143] The proposed categories for individuals (''self employed'' and ''otherwise employed'') have been condensed into a single requirement to identify a large trader as an individual.

[144] Although proposed Schedule 4 to Form 13H did not specify that only the identities of executive officers were required, the proposed instructions to the Form indicated that the proposed Form did not seek to collect the identities of all officers of the large trader.

Form.[145] As discussed below, some commenters, particularly investment advisers, noted that this requirement would be impractical or at least very burdensome and could require disclosure of potentially hundreds of thousands of account numbers.[146] One commenter explained that many investment advisers do not know the account numbers assigned to them by broker-dealers because that information is not required by the software they use to communicate order allocation and settlement instructions to broker-dealers.[147] Other commenters stated that some investment advisers for defined contribution plans do not have access to account information because the plan record-keepers, not the investment advisers who provide instructions to the record-keepers, establish and maintain the relationships with the broker-dealers.[148] Even for large traders that have ready access to their brokerage account numbers, commenters suggested that the sheer volume of that information, and the frequency with which it might change, would make regular disclosure extremely burdensome.[149] Other commenters stated that account numbers sometimes are embedded with personally identifiable information and objected to the requirement because: (1) The Commission should not require investment advisers to disclose their clients' identities;[150] and (2) the burdens necessary for the Commission to establish sufficiently robust safeguards to protect the confidentiality of this information would be considerable.[151]

Some commenters suggested alternatives to disclosing account numbers in the proposed Form. One commenter suggested that the Commission instead require large traders to maintain and submit only upon request the required brokerage account information.[152] Two other commenters suggested revising the proposed Form to instead collect the names of broker-dealers through which the large trader executes transactions.[153]

Based on the comments received, the Commission understands that the provision of brokerage account information through Form 13H could burden some large traders in light of current industry practices. While this information could be of value to the Commission, the Commission has determined to not adopt Schedule 6 as proposed. Instead, the adopted Form requires that large traders identify the registered broker-dealers at which the large trader or any of its Securities Affiliates has an account and disclose whether each such broker-dealer provides prime broker, executing broker, and/or clearing broker services. If the Commission needs more specific individual account-level information, it can use the provided list of broker-dealers and the services they provide to make targeted requests to those entities for more detailed information.[154] In addition, the Commission notes that it may contact the large trader directly pursuant to Rule 13h–1(b)(4) to seek additional information to further identify the large trader and all accounts through which the large trader effects transactions.[155]

One of the commenters who suggested this approach cautioned that any list of broker-dealers provided by large traders should be kept confidential because leakage of such information (and particularly leakage of changes to such a list) could impact the stock price of publicly traded broker-dealers on that list.[156] The confidential treatment of all information collected through Form 13H is discussed below.

g. Confidentiality

A number of commenters underscored the sensitive nature of the information collected on Form 13H and expressed support for the Commission's position that the information would be protected as contemplated by the Market Reform Act.[157] Two commenters expressed concern about the risk of theft and/or inadvertent disclosure of private client names and account numbers.[158] One commenter asked whether the Commission would share information about Unidentified Large Traders with other regulatory agencies for supervisory or enforcement purposes.[159] Additionally, two commenters suggested that the Commission monitor for misuses of confidential information such as front-running.[160]

The Commission is committed to maintaining the information collected pursuant to Rule 13h–1 in a manner consistent with Section 13(h)(7) of the Exchange Act.[161] The statute specifies that the Commission shall not be compelled to disclose information collected from large traders and registered broker-dealers under a large trader reporting system, subject to limited exceptions. Specifically, the statute provides that:

> Nothing in this subsection shall authorize the Commission to withhold information from Congress, or prevent the Commission from complying with a request for information from any other Federal department or agency requesting information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.[162]

The legislative history of Exchange Act Section 13(h) suggests that Congress: (1) Understood that confidential information that could reveal proprietary trading strategies to competitors would be collected and correspondingly restricted public access to this information; and (2) crafted the exceptions to (a) ensure that it could obtain information from the

[145] *See, e.g.,* Anonymous e-mail dated June 22, 2010; Wellington Management Letter at 3–6; and Financial Engines Letter at 4–6.

[146] *See, e.g.,* Wellington Management Letter at 3–4.

[147] *See id.*

[148] *See* Financial Engines Letter at 4–5 and Investment Adviser Association Letter at 6. One commenter added that some investment managers do not have account number information because they execute trades with registered broker-dealers with whom they have only an informal relationship and no contract. *See* Investment Adviser Association Letter at 6.

[149] For example, one investment adviser stated that there are over 400,000 separate broker-dealer account numbers associated with its clients. *See* Wellington Management Letter at 3. It further stated that it currently does not maintain a list of those account numbers. *See id.*

[150] One commenter stated the requirement, which would disclose client information, may: (1) raise numerous privacy issues, particularly with respect to transmission of confidential information from foreign jurisdictions such as members of the European Union and Switzerland and (2) harm relationships between investment managers and their clients. *See* Investment Adviser Association Letter at 6.

[151] *See* David L. Goret Letter at 3.

[152] *See* American Banking Association Letter at 2.

[153] *See* Wellington Management Letter at 4 and Investment Company Institute Letter at 8–9.

[154] Under Exchange Act Rules 17a–25 and 13h–1, broker-dealers are required to maintain and report the applicable account numbers in which a transaction was effected. Accordingly, the Commission will obtain information on account numbers in connection with a particular request for data.

[155] One commenter suggested it was unnecessary to collect brokerage account information because, if necessary, the Commission could request more detailed information from the large trader pursuant to proposed Rule 13h–1(b)(4). *See* Investment Adviser Association Letter at 7.

[156] *See* Investment Company Institute Letter at 9, n.18.

[157] *See, e.g.,* Wellington Management Letter at 6; Financial Engines Letter at 7; Investment Adviser Association Letter at 10; and Investment Company Institute Letter at 2, 4.

[158] *See* Anonymous e-mail dated June 22, 2010 and Managed Funds Association Letter at 3–4.

[159] *See* SIFMA Letter at 19.

[160] *See* T. Rowe Price Letter at 2 and Investment Adviser Association Letter at 10.

[161] *See* 15 U.S.C. 78m(h)(7).

[162] 15 U.S.C. 78m(h)(7).

Commission; (b) allow the Commission to grant access to federal departments and other federal agencies acting within the scope of their jurisdictions; and (c) allow the Commission to comply with an order of a court of the United States in certain actions.[163]

While the Commission must share the information it collects on large traders as outlined above, the Commission is committed to protecting the confidentiality of that information to the fullest extent permitted by applicable law. By assuring large traders of the confidentiality of information they provide to the Commission, the Commission is addressing commenters' concerns.

B. Broker-Dealers: Recordkeeping, Reporting, and Monitoring

As proposed, Rule 13h–1 would impose recordkeeping and reporting responsibilities on the following: registered broker-dealers that are large traders; registered broker-dealers that, together with a large trader or Unidentified Large Trader, exercise investment discretion over an account; and registered broker-dealers that carry accounts for large traders or Unidentified Large Traders or, with respect to accounts carried by a non-broker-dealer, broker-dealers that execute transactions for large traders or Unidentified Large Traders. In addition, the proposed rule would require certain registered broker-dealers to implement procedures to encourage and foster compliance with the self-identification requirements of the proposed rule. As discussed in greater detail below, after considering the comments received on the Rule's application to registered broker-dealers, the Commission is adopting these provisions of the Rule substantially as proposed, but with some modifications to reflect certain comments and to clarify the requirements applicable to registered broker-dealers.

1. Recordkeeping Requirements

The Commission received few comments concerning the proposed recordkeeping requirements,[164] and is adopting Rule 13h–1(d) substantially as proposed with one modification.[165] As proposed, every registered broker-dealer would have been required to maintain records of information for, among others, ''(i) an account such broker-dealer carries for a large trader or an Unidentified Large Trader, (ii) an account over which such broker-dealer exercises investment discretion together with a large trader or an Unidentified Large Trader, or (iii) if the broker-dealer is a large trader, any proprietary or other account over which such broker-dealer exercises investment discretion.'' The Commission is not adopting the requirement to maintain records for accounts over which such broker-dealer exercises investment discretion together with a large trader or an Unidentified Large Trader.

As described above, in connection with the requirement for large traders to disclose on Form 13H a list of broker-dealers at which a large trader or any Securities Affiliate has an account rather than a list of account numbers at such broker-dealers as proposed, the Commission is not adopting the proposed requirement that large traders disclose their LTIDs to other large traders.[166] Thererfore, large traders will not be required to communicate their LTIDs to other traders, and, consequently, there is no mechanism in the Rule for a large trader to be informed of the status of another trader with whom it jointly exercises investment discretion.

Similarly, the Commission believes it is appropriate to narrow the scope of the recordkeeping duty concerning accounts over which a broker-dealer exercises investment discretion together with a large trader or an Unidentified Large Trader. Accordingly, under the Rule as adopted, registered broker-dealers must maintain records for all transactions effected directly or indirectly by or through (i) an account such broker-dealer carries for a large trader or an Unidentified Large Trader or (ii) if the broker-dealer is a large trader, any proprietary or other account over which such broker-dealer exercises investment discretion. As a practical matter, however, the Commission will continue to have access to records of any account over which a broker-dealer exercises investment discretion together with a large trader or an Unidentified Large Trader by virtue of the fact that such an account is an account of a large trader subject to the recordkeeping requirements.

In addition, the Commission is adopting as proposed the requirement that, where a non-broker-dealer carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting transactions directly or indirectly for such large trader or Unidentified Large Trader maintain records of all of the required information.

One commenter asked whether registered broker-dealers would be required to maintain records of transactions by inactive large traders.[167] In the Proposing Release, the Commission stated that an inactive large trader could inform its broker-dealers of its Inactive Status and request that they discontinue tagging its transactions with its LTID.[168] The Rule does not require a broker-dealer to maintain records of transactions by an inactive large trader after receiving notice from the large trader that the trader had filed for inactive status with the Commission on Form 13H.

One commenter asked the Commission to clarify Rule 13h–1(d)(5),[169] which requires that the ''records and information required to be made and kept pursuant to the provisions of this rule shall be available on the morning after the day the transactions were effected (including Saturdays and holidays).''[170] Specifically, the commenter asked whether, by requiring that records be available on Saturdays and holidays, the Commission expects that broker-dealers might be required to submit transaction data on Saturdays and holidays. The Commission notes that the Rule contemplates that broker-dealers might be called upon by the Commission to report data to the Commission on a Saturday or holiday, consistent with the legislative history that accompanies Section 13(h).[171] Depending on the

[163] *See* Senate Report, *supra* note 14, at 41.

[164] *See* SIFMA Letter at 10, 14 and Financial Information Forum Letter at 5.

[165] While paragraph (d)(2) of the Rule sets forth the information that is to be maintained for each transaction, subparagraph (xiii) requires that the broker-dealer record the LTIDs ''associated with the account, unless the account is for an Unidentified Large Trader.'' This provision effectively requires that a broker-dealer tag an LTID to an account rather than to each transaction. In addition, for an Unidentified Large Trader, the Commission expects broker-dealers to assign their own unique identifier to the applicable account(s).

[166] *See* discussion *supra* at Section III.A.2.b. The proposed requirement that large traders disclose their LTIDs to other large traders was intended to facilitate the ability of a large trader to complete Form 13H, including the provisions that required it to identify its account numbers and the LTID of any trader with whom it shared investment discretion over the account.

[167] *See* Financial Information Forum Letter at 5.

[168] *See* Proposing Release, *supra* note 3, at 21464. As discussed above, Inactive Status relieves a former large trader from having to file and amend Form 13H with the Commission. The Rule, however, does not specifically require a registered broker-dealer to discontinue tagging the trader's transactions with its LTID. As discussed below, Form 13H and the information contained therein, is confidential. Accordingly, the Commission would not reveal a large trader's status to a broker-dealer that sought to confirm a reported Inactive Status.

[169] *See* Financial Information Forum Letter at 3.

[170] *See id.*

[171] *See* Senate Report, *supra* note 14, at 40. *See also* Section 13(h) of the Exchange Act, 15 U.S.C. 78m(h)(2), providing that ''[r]ecords shall be

urgency of the situation, the Commission may need prompt access to large trader data and the Rule contemplates that possibility.[172] The provisions applicable to the reporting of data to the Commission are discussed below.

2. Reporting Requirements

As proposed, Rule 13h–1(e) would require every registered broker-dealer who is itself a large trader, exercises investment discretion over an account together with a large trader or an Unidentified Large Trader, or carries an account for a large trader or an Unidentified Large Trader to report to the Commission upon request records they keep pursuant to Rule 13h–1(d)(1). In addition, as proposed, where a non-broker-dealer carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting such transactions directly or indirectly for a large trader would be required to report such records.

As described above, the Commission is not adopting the proposed requirement on large traders to disclose their LTIDs to other large traders.[173] The Commission believes it is appropriate to similarly narrow the scope of the reporting duty to not extend the reporting requirement to broker-dealers that exercise investment discretion over an account together with a large trader or an Unidentified Large Trader.

Accordingly, as adopted, upon the request of the Commission, every registered broker-dealer who is itself a large trader or carries an account for a large trader or an Unidentified Large Trader shall electronically report to the Commission all information required under paragraphs (d)(2) and (d)(3) for all transactions effected directly or indirectly by or through accounts carried by such broker-dealer for large traders and Unidentified Large Traders, equal to or greater than the reporting activity level. Additionally, where a non-broker-dealer carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting such transactions directly or indirectly for a large trader shall electronically report such information.

Broker-dealers will be required to report a particular day's trading activity if it equals or exceeds the ''reporting activity level'' of 100 shares.[174] Transaction reports must be submitted to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.[175]

The Commission solicited [176] and received comments regarding the reporting duty of registered broker-dealers.[177] One commenter, in observing that the proposed rule would require registered broker-dealers to submit transaction data to the Commission before the close of business on the day specified in the request for such transaction information, asked for clarification about whether the day could be the same day the request is made.[178] The same commenter suggested that the Commission should allow registered broker-dealers a full business day, based on the time of the request, to respond to data requests.[179] Other commenters suggested longer periods. One suggested two days,[180] and one suggested affording registered broker-dealers 10 business days to respond, which could be shortened over time to three business days.[181] The latter commenter opposed the proposed deadline, stating that broker-dealers' existing infrastructure cannot respond to data requests for large trader transactions within one business day. As noted in the Proposing Release, the Commission expects that certain system enhancements will be required to prepare broker-dealers' existing EBS infrastructure for compliance with Rule 13h–1, including the provisions regarding the availability of data.[182] While the Commission does not anticipate that, under normal circumstances, it would request delivery of large trader transaction data on the same day the request is made, the Commission believes it is important that it have the flexibility to do so if required by the urgency of the situation.[183]

In response to the requests of commenters to provide additional guidance on the expected timeframe within which broker-dealers would need to submit transaction data to the Commission, the Commission is adopting a modified version of Rule 13h–1(e) to provide that reports of transactions must be ''submitted to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.''

The Commission understands from one commenter that EBS data processes are normally done during overnight batch runs.[184] In light of these considerations, the Commission believes it would be appropriate for broker-dealers to utilize any overnight process they may have currently in production, and the Rule as adopted provides that the Commission will normally request reports to be submitted in manner that allows time for such overnight processing.

However, under unusual circumstances, the Commission may request more immediate responses that may require some broker-dealers to perform a manual process in order to provide reports to the Commission

*reported to the Commission * * * immediately upon request by the Commission * * *.''*

[172] The Commission notes that while new Rule 13h–1(d)(5) governs the *availability* of data, new Rule 13h–1(e) governs the *reporting* of transaction data by broker-dealers to the Commission. Specifically, that provision requires registered broker-dealers to submit transaction data ''no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.'' Accordingly, while information must be available on the morning after the transaction was effected, the reporting deadline is based upon the day of the Commission's request.

[173] *See* discussion *supra* at Section III.A.2.b.

[174] New Rule 13h–1(a)(8) defines the reporting activity level as: ''(i) Each transaction in NMS securities, effected in a single account during a calendar day, that is equal to or greater than 100 shares; (ii) any other transaction in NMS securities, effected in a single account during a calendar day, that a registered broker-dealer may deem appropriate; or (iii) such other amount that may be established by order of the Commission from time to time.'' The Commission solicited comment about a number of aspects of the proposed reporting activity level, *see* Proposing Release, *supra* note 3, 75 FR at 21473, but received no comments regarding the proposed threshold.

[175] *Cf.* Exchange Act Section 13(h)(2), 15 U.S.C. 78m(h)(2), which requires that ''[s]uch records shall be available for reporting to the Commission, or any self-regulatory organization that the Commission shall designate to receive such reports, on the morning of the day following the day the transactions were effected, and shall be reported to the Commission or a self-regulatory organization designated by the Commission immediately upon request by the Commission or such a self-regulatory organization.''

[176] *See* Proposing Release, *supra* note 3, 75 FR at 21473.

[177] *See, e.g.,* Financial Information Forum Letter at 4 and SIFMA Letter at 13–17.

[178] *See* Financial Information Forum Letter at 2.

[179] *See id.*

[180] *See* Prudential Letter at 5.

[181] *See* SIFMA Letter at 15.

[182] *See* Proposing Release, *supra* note 3, 75 FR at 21471.

[183] The Commission notes that the Rule requires that trade data be available for reporting to the Commission on the morning after the day the transactions were effected (which could include Saturdays and holidays). As specified in new Rule 13h–1(e), in response to a Commission request for transaction data, the information must be reported to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.

[184] *See* Financial Information Forum Letter at 3.

sooner than could be accommodated by an overnight batch process. For example, on the morning following a market event such as May 6, 2010, the Commission could request data about the prior day to be submitted the same day as the request is made. The Commission recognizes that under these circumstances, depending on the nature of broker-dealer's systems, the report data may be preliminary and require updating by the opening of business of the day following the request. One commenter inquired whether registered broker-dealers would be required to submit transaction data directly to the Commission instead of through the normal channel for EBS submissions.[185] As adopted, Rule 13h–1(e) requires that reports be submitted ''electronically, in machine-readable form and in accordance with a format specified by the Commission that is based on the existing EBS system format.'' Like Exchange Act Rule 17a–25, this provision does not require (or prohibit) preparation or transmission of reports by any intermediary. However, as stated in the Proposing Release, in order to mitigate costs on registered broker-dealers, the Commission intends to utilize the existing infrastructure of the EBS system for the large trader reporting rule.

Another commenter asked whether the Commission intended to request transaction data according to LTID.[186] The Commission expects that it would, on occasion, request EBS data according to LTID. A narrowly-focused request for transaction records of a particular large trader would help the Commission obtain in the most efficient manner possible targeted and limited data and should reduce the burden on broker-dealers by allowing them to provide smaller files in response to an EBS request for records of specific large traders.

One commenter recommended using the OATS system maintained by the Financial Industry Regulatory Authority (''FINRA'') instead of the EBS system for the large trader reporting rule. The commenter pointed out that, unlike the EBS system, OATS processes are tied to front office order and execution systems and thus could more readily incorporate the proposed new field of execution time.[187] Further, the commenter noted that OATS should be able to provide next day reporting.[188] The Commission, however, believes that the large trader reporting requirements can be most efficiently implemented and operated through relatively modest enhancements to the existing EBS system. Use of OATS, which is maintained by FINRA, would involve expanding OATS to additional categories of securities (*e.g.,* options) and making additional enhancements to accommodate the records that would need to be kept pursuant to the Rule. For these reasons, the Commission does not believe basing the large trader reporting rule on OATS is appropriate at this time.

3. Monitoring Requirements

Overview of Proposed Rule. Under proposed Rule 13h–1(d) and (e), certain registered broker-dealers would be subject to recordkeeping and reporting responsibilities for their customers that meet the criteria for Unidentified Large Traders. Proposed Rule 13h–1(a)(9) defined ''Unidentified Large Trader'' as ''each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this rule that a registered broker-dealer knows or has reason to know is a large trader.'' The proposed Rule provided that a registered broker-dealer ''has reason to know whether a person is a large trader based on the transactions in NMS securities effected by or through such broker-dealer.''

In assessing whether a broker-dealer ''has reason to know'' whether one of its customers may be a large trader, the proposed rule effectively would have required the broker-dealer to take into account trading activity in its own customer accounts.

Proposed Rule 13h–1(f) also contained a safe harbor that was designed to reduce the broker-dealer's burdens in connection with monitoring its customers' trading for purposes of identifying possible large traders.[189] The safe harbor in proposed Rule 13h–1(f) required reasonably designed systems to detect and identify persons that may be large traders—based upon transactions effected through an account or group of accounts or other information readily available to the broker-dealer. Further, the proposed safe harbor required reasonably designed systems to inform such persons of their potential obligations under Rule 13h–1.

The proposed monitoring requirements were intended to promote awareness of and foster compliance with Rule 13h–1 by customers who might not be aware of their large trader reporting responsibilities. As noted in the Proposing Release, the proposed rule placed ''the principal burden of compliance with the identification requirements on large traders themselves'' [190] while the broker-dealer monitoring requirements were intended to be ''limited'' and ''a necessary backstop to encourage compliance and fulfill the objectives of Section 13(h) of the Exchange Act.'' [191]

Comments Received. In the Proposing Release, the Commission requested comments on the proposed monitoring requirements and the related safe harbor.[192] The Commission received several comments that addressed the proposed duty to monitor customers for purposes of Rule 13h–1.[193] One commenter asserted that the Commission lacks the statutory authority to impose a monitoring requirement on registered broker-dealers in connection with the large trader reporting rule.[194] A few commenters asked for clarification of the monitoring requirements and offered alternatives.[195] Of those commenters that addressed the issue, most were critical of the proposed monitoring requirements.[196] One commenter characterized the role of broker-dealers under the proposed rule as ''gatekeepers,'' and asserted that ''the proposed rule would impose on broker-dealers much of the operational monitoring regarding registration of large traders.'' [197] Two commenters asked whether the Rule would require broker-dealers to stop doing business with Unidentified Large Traders.[198] One of those commenters asserted that it should not because that would have the unintended consequence of driving customers to broker-dealers who may be less diligent in monitoring for large traders.[199] These two commenters also requested guidance about whether the monitoring provisions required any

[185] *See id.*

[186] *See id.* at 2.

[187] *See* SIFMA Letter at 15.

[188] *See id.*

[189] *See* Proposing Release, *supra* note 3, 75 FR at 21470.

[190] *Id.*

[191] *Id.*

[192] *See id.* at 21472–73.

[193] *See, e.g.,* Financial Information Forum Letter at 4–5; GETCO Letter at 3; and SIFMA Letter at 9–13.

[194] *See* SIFMA Letter at 11.

[195] *See, e.g.,* Financial Information Forum Letter; SIFMA Letter; and GETCO Letter.

[196] One commenter described the proposed safe harbor as ''anything but safe'' and, as discussed above, asserted that the proposal exceeds the Commission's statutory authority because, among other reasons, the safe harbor provided that a registered broker-dealer would have reason to know that a customer is an Unidentified Large Trader based on other readily available information, as well as transactions effected through the broker-dealer. *See* SIFMA Letter at 11.

[197] *Id.* at 9.

[198] *See id.* at 11 and Financial Information Forum Letter at 5.

[199] *See* SIFMA Letter at 11.

specific policies and procedures.[200] Another commenter asked whether a broker-dealer has a duty to proactively determine whether a customer is an Unidentified Large Trader based on the broker-dealer's knowledge that its customer maintains accounts at other broker-dealers.[201]

Summary of Monitoring Requirements in Final Rule. The Commission addresses these comments below, but for purposes of clarity we also will briefly summarize the monitoring requirements in the final Rule. As adopted, the Rule requires that a registered broker-dealer treat as an Unidentified Large Trader (for purposes of the recordkeeping and reporting provisions in paragraphs (d) and (e) of the Rule) any person that the broker-dealer ''knows or has reason to know'' is a large trader where such person has not complied with the identification requirement applicable to large traders (*i.e.,* identified itself as a large trader to the broker-dealer and disclosed the accounts to which its LTID applies). As noted in Rule 13h–1(a)(9), in considering whether the broker-dealer has ''reason to know'' that a person is a large trader, however, the broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer (*i.e.,* it need not seek out information on transactions effected by that person through another broker-dealer). Moreover, a broker-dealer may determine that it has no ''reason to know'' that a person is a large trader through two methods. First, the broker-dealer may simply conclude, based on its knowledge of the nature of its customers and their trading activity with the broker-dealer, that it has no reason to expect that any of these customers' transactions approach the identifying activity level.[202] Second, the broker-dealer may rely on the safe harbor provision in paragraph (f) of the Rule. Under the safe harbor, a registered broker-dealer would be deemed not to know or have reason to know that a person is a large trader if it does not have actual knowledge that a person is a large trader and it establishes policies and procedures reasonably designed to identify customers whose transactions at the broker-dealer equal or exceed the identifying activity level and, if so, to treat such persons as Unidentified Large Traders and notify them of their potential reporting obligations under this Rule. Under either approach, a broker-dealer's obligation with respect to an Unidentified Large Trader is limited to compliance with the requirements of paragraphs (d) and (e) of the Rule, and the broker-dealer would not be required to cease trading or take other action with respect to that Unidentified Large Trader.[203] The Commission notes that, pursuant to the reporting requirements of the Rule, it may periodically request reports from broker-dealers regarding all customers they may be treating as Unidentified Large Traders.

Response to Comments and Discussion of the Final Rule. The Commission carefully considered the comments on the proposed rule, and therefore is providing responses and additional clarifications below regarding the monitoring requirements required under this Rule. In response to the comment asserting that the Commission lacks authority to impose monitoring requirements, we note that the explicit authority under Section 13(h) of the Exchange Act to adopt this Rule is supplemented by Section 23(a) of the Exchange Act, which allows the Commission to ''make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which they are responsible or for the execution of the functions vested in them by this title. * * *''[204] Further, Section 13(h)(2) of the Exchange Act specifically authorizes the Commission to require registered broker-dealers to report transactions that ''equal or exceed the reporting activity level effected directly or indirectly by or through [them] * * * for any person that such broker or dealer *has reason to know* is a large trader on the basis of transactions in securities effected by or through such broker or dealer'' (emphasis added).[205] That section, then, contemplates that registered broker-dealers would take into account their own customers' trading (which they have reason to know). The Commission believes, therefore, that it is reasonable to require broker-dealers to take into account a customer's trading activity through the broker-dealer's accounts to implement Section 13(h).

The Commission is, however, making several modifications to the proposed rule in response to commenters' requests for additional clarification. First, in response to questions regarding the scope of the information that a broker-dealer must consider in determining whether a person may be a large trader, the Commission is adopting a definition of Unidentified Large Trader to clarify what was intended in the proposed Rule—that a broker-dealer does not have ''reason to know'' that a person is a large trader other than by reference to transactions in accounts of the broker-dealer. In particular, proposed paragraph (a)(9) of the Rule would have defined an Unidentified Large Trader as a ''person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this rule that a registered broker-dealer knows or has reason to know is a large trader.'' It further provided that ''[a] registered broker-dealer has reason to know whether a person is a large trader based on the transactions in NMS securities effected by or through such broker-dealer.'' To clarify the Commission's intent for determining whether a registered broker-dealer has reason to know, the Commission is adopting a revised second sentence of paragraph (a)(9) of the Rule to provide: ''For purposes of determining under this rule whether a registered broker-dealer has reason to know that a person is a large trader, a registered broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer.'' In other words, when considering whether a customer's trading activity has exceeded the ''identifying activity level,'' the broker-dealer need only consider the customer's activity effected through an account or a group of accounts at that broker-dealer. If that activity rose to the ''identifying activity level'', the broker-dealer would be required to treat the customer as an Unidentified Large Trader. Beyond considering the transactions effected through an account or a group of accounts at the broker-dealer, however, the broker-dealer is not required to proactively make further inquiries for the purpose of determining its customer's status (*e.g.,* by seeking to determine the customer's trading activity at other broker-dealers). However, if a registered broker-dealer

[200] *See id.* at 10 and Financial Information Forum Letter at 5.

[201] *See* SIFMA Letter at 10.

[202] For example, the broker-dealer may know, or learn from its customer, that the transactions over the identifying activity level were effected in connection with a tender offer, which are excluded under the Rule for purposes of determining whether a person is a Large Trader. Alternatively, the broker-dealer may know, or learn from its customer, that the account in question is an omnibus account and that the individual subaccounts do not exceed the identifying activity level.

[203] The Commission reiterates that the monitoring requirements are intended to be a ''limited'' duty that serves as ''a necessary backstop to encourage compliance and fulfill the objectives of Section 13(h) of the Exchange Act.'' Proposing Release, *supra* note 3, 75 FR at 21470. The Commission believes that requiring limited monitoring by broker-dealers will help assure that the objectives of the Rule are met and is consistent with the statutory intent of Section 13(h) of the Exchange Act.

[204] 15 U.S.C. 78w(a).

[205] 15 U.S.C. 78m(h)(2).

nevertheless has actual knowledge that a person is a large trader and the person has not provided the broker-dealer with a LTID, then the broker-dealer must treat the person as an Unidentified Large Trader under the recordkeeping and reporting requirements of the Rule.

Further, in response to questions regarding the scope of a broker-dealer's obligations with respect to an Unidentified Large Trader, the Commission notes that the Rule does not require a broker-dealer to stop doing business with Unidentified Large Traders. Rather, paragraph (d)(3) of the Rule requires broker-dealers to maintain information on Unidentified Large Traders, and paragraph (e) requires broker-dealers to report that information to the Commission on request.[206] Moreover, the Rule does not require a broker-dealer to proactively or affirmatively determine who is in fact a large trader. A potential large trader is required to assess for itself whether it meets the identifying activity threshold and thus qualifies as a large trader. The Commission notes that in some cases only the potential large trader would know whether it in fact is a large trader because certain types of transactions are excluded from the identifying activity level calculation. For example, a broker-dealer may have a customer that effected $22,000,000 worth of transactions through that broker-dealer in a given day, in excess of the identifying activity threshold. If that customer did not previously identify itself as a large trader to the broker-dealer by providing an LTID and identifying the accounts to which it applies, then the broker-dealer would treat the customer as an Unidentified Large Trader. However, the customer may not, in fact, be required to register as a large trader because the customer may not have exercised investment discretion over those transactions.

The Commission also is making several modifications to paragraph (f) from the proposal to clarify the requirements of the safe harbor provision contained in that paragraph. As noted above, this safe harbor would provide a broker-dealer with assurance as to whether it has ''reason to know'' that a person is a large trader, and therefore whether the broker-dealer must treat such person as an Unidentified Large Trader. As a practical matter, the Commission expects that broker-dealers with customers whose trading activities could exceed the identifying activity level will likely elect to avail themselves of the safe harbor. To qualify under the safe harbor, the broker-dealer must (i) implement policies and procedures reasonably designed to identify customers whose trading activity exceeds the identifying activity level, (ii) treat such customers as Unidentified Large Traders for purposes of the Rule, and (iii) notify such customers of their potential obligation to comply with the rule as a large trader.

Certain technical changes to paragraph (f) have been made to clarify these requirements. For example, paragraphs (f)(1) and (2) now make clear that if a customer's trading activity exceeds the identifying activity level, and the customer has not self-identified as a large trader, the broker-dealer must treat that customer as an Unidentified Large Trader for purposes of the Rule. In addition, paragraph (f)(1) has been revised to clarify that—consistent with the definition of Unidentified Large Trader—the broker-dealer's policies and procedures for measuring a customer's trading activity need only consider transactions effected in accounts carried by the broker-dealer or through which the broker-dealer executes transactions.[207]

ATSs. One commenter,[208] a broker-dealer that operates an ATS, argued that an ATS should not have a duty to monitor its subscribers' compliance with the large trader identification requirements. The commenter argued that, just as an exchange would not have an obligation to monitor its broker-dealer members' compliance with proposed Rule 13h–1, a broker-dealer that operates an ATS should not be required to monitor whether its subscribers are complying with the requirements of the rule. The Commission notes that the monitoring requirements are only applicable to registered broker-dealers that are large traders, carry accounts for large traders or Unidentified Large Traders, or effect transactions on behalf of large trader customers whose accounts are carried by non-broker-dealers. If an ATS is not operating in those capacities, then it is not subject to the monitoring requirements.

C. Foreign Entities

In the Proposing Release, the Commission requested comment about whether the proposed treatment of foreign entities is appropriate and the extent to which foreign statutes might complicate compliance with the proposed rule by foreign large traders.[209] In addition, the Commission solicited comment concerning whether the proposed rule would have any unintended negative consequences for the U.S. markets.[210] The Commission received a number of comments, both general and specific, on these topics.[211] One commenter expressed concern with the broad definition of ''large trader'' applying to non-U.S. entities, and suggested that the Commission modify the proposed rule to impose recordkeeping and reporting requirements solely on registered broker-dealers.[212] The Commission believes that limiting the definition of ''large trader'' in the suggested manner would be inconsistent with the legislative intent behind Section 13(h), as evidenced by the plain language of the statute.[213] The statute contemplates that the Commission would be able to identify all persons who are large traders, not just large traders who are U.S. entities. Accordingly, the Rule requires a foreign entity that is a large trader to comply with the identification requirements of paragraph (b) of the Rule. With respect to the recordkeeping and reporting requirements, however, the Commission notes that paragraphs (d) and (e) of the Rule, concerning

[206] The Rule does not address any other obligation or potential liability of the broker-dealer under any other provisions of the federal securities laws.

[207] In addition, as proposed, paragraph (f) applied to broker-dealers that are large traders, exercise investment discretion over an account together with a large trader or Unidentified Large Trader, carry an account for a large trader or Unidentified Large Trader, or effect transactions directly or indirectly for a large trader where a non-broker-dealer carries the account. Because the Commission is not adopting the proposed requirement to disclose account numbers or the corresponding requirements on large traders to disclose their LTIDs to other large traders, the Commission believes it is appropriate to streamline the introduction to paragraph (f) to refer to broker-dealers generally, and to modify sub-paragraph (1) to refer to transactions effected through an account or a group of accounts carried by such broker-dealer or through which such broker-dealer executes transactions, as applicable.

[208] *See* GETCO Letter at 3.

[209] *See* Proposing Release, *supra* note 3, 75 FR at 21473.

[210] *See id.* at 21482.

[211] *See, e.g.,* European Banking Federation and Swiss Bankers Association Letter at 2–5 and SIFMA Letter at 12–13.

[212] *See* European Banking Federation and Swiss Bankers Association Letter at 3.

[213] Section 13(h)(1) in pertinent part provides that each large trader shall: (A) Provide such information to the Commission as the Commission may by rule or regulation prescribe as necessary or appropriate, identifying such large trader and all accounts in or through which such large trader effects such transactions; and (B) identify, in accordance with such rules or regulations as the Commission may prescribe as necessary or appropriate, to any registered broker or dealer by or through whom such large trader directly or indirectly effects securities transactions, such large trader and all accounts directly or indirectly maintained with such broker or dealer by such large trader in or through which such transactions are effected.

recordkeeping and reporting, respectively, explicitly apply only to U.S.-registered broker-dealers.

One commenter suggested that it would be impractical for a registered broker-dealer to collect identifying information required by proposed Rule 13h–1(d)(3) when such collections may be prohibited under foreign laws.[214] The commenter further suggested that, because registered broker-dealers may not be able to comply with this provision, they ''may effectively be forced to cease providing services to non-U.S. intermediaries acting on behalf of unidentified non-U.S. Traders. * * *''[215] Another commenter suggested that it would be impractical for a registered broker-dealer to monitor for foreign Unidentified Large Traders who trade through intermediaries.[216] The commenter asked for clarification in this context regarding a registered broker-dealer's duty to inform its customers about the self-identification requirements of the Rule.[217] Specifically, the commenter asked whether it would be sufficient for the broker-dealer to notify the foreign intermediary of its customer's possible obligation to comply with the self-identification requirements of the Rule. As discussed further below, when a U.S. registered broker-dealer deals directly with a foreign entity that is an intermediary, it would treat that foreign intermediary like any other customer: it must collect the information specified by Rule 13h–1(d)(2) about the foreign intermediary's transactions if it is a large trader and, if it is an Unidentified Large Trader,[218] the broker-dealer must also collect the information specified by Rule 13h–1(d)(3).[219] The Rule does not require a registered broker-dealer to collect the identifying information about the foreign intermediary's customers.[220]

As discussed above, Rule 13h–1(f) provides that a registered broker-dealer shall be deemed not to know or have reason to know that a person is a large trader if it establishes policies and procedures reasonably designed to assure compliance with the identification requirements of the Rule and does not have actual knowledge to the contrary. Those policies and procedures would need to be reasonably designed to identify potential large traders based upon transactions effected through an account or a group of accounts considering account name, tax identification number, or other identifying information available on the books and records of the broker-dealer. The Rule does not require broker-dealers to definitively determine who is, in fact, a large trader.

Further, in the case of foreign intermediaries, the Commission recognizes that the U.S. registered broker-dealer may only know as its customer the foreign intermediary, not the persons trading through the account of the foreign intermediary. In such case, the registered broker-dealer's policies and procedures would apply to its contact with the foreign intermediary. If the intermediary effects transactions through the U.S. broker-dealer that exceed the identifying activity level, then the safe harbor contemplates, as discussed above, that the broker-dealer inform the intermediary that the intermediary may be a large trader under Rule 13h–1. The foreign intermediary, then, bears the principal burden of compliance in determining whether it is a large trader.

With respect to the requirement on large traders to file Form 13H with the Commission, the Commission is aware that the laws of certain foreign jurisdictions may hinder a foreign large trader's ability to disclose certain personal identifying information. In the event, which the Commission believes to be unlikely, that the laws of a large trader's foreign jurisdiction preclude or prohibit the large trader from waiving such restrictions or otherwise voluntarily filing Form 13H with the Commission, then such foreign large traders or representatives of foreign large traders may request an exemption from the Commission pursuant to Section 36 of the Exchange Act[221] and paragraph (g) of the Rule.[222]

Commenters also discussed the practical difficulties associated with requiring large traders (such as investment advisers) to disclose account numbers. A few commenters stated that the proposal was unclear as to whether it would have required collection of brokerage account information or the account numbers assigned by investment advisers that sometimes contain client-identifying information.[223] The Commission has addressed this concern by not adopting the proposed requirement to report brokerage account numbers, as discussed above.[224] Instead, the Commission is requiring that a large trader provide information about the registered broker-dealers through which Securities Affiliates have an account. One commenter asserted that many foreign large traders do not have a direct relationship with any registered broker-dealer because they utilize intermediaries.[225] The commenter stated that the large trader's ability to provide information about the ''ultimate broker may be incomplete at best and may result in inadvertently misleading the Commission.''[226] The Commission does not believe that it is unduly burdensome to expect a large trader to be able to identify the foreign intermediary with which it maintains accounts. The Commission expects all large traders, regardless of their place of domicile, to identify each broker-dealer at which it or any Securities Affiliate has an account and disclose the type(s) of services provided.

D. Three Specific Factors Considered by the Commission Pursuant to Section 13(h) of the Exchange Act

When engaging in rulemaking pursuant to its authority under Section 13(h), the Commission is required to take into account the following factors: (A) Existing reporting systems; (B) the costs associated with maintaining information with respect to transactions effected by large traders and reporting

[214] *See* European Banking Federation and Swiss Bankers Association Letter at 3.

[215] *See id.*

[216] *See* SIFMA Letter at 12.

[217] *See id.*

[218] *See* discussion *supra* at Section III.B.3 (concerning monitoring for Unidentified Large Traders).

[219] Rule 13h–1(d)(3) requires a broker-dealer to maintain the following additional information for an Unidentified Large Trader: name, address, date the account was opened, and tax identification number(s). If an Unidentified Large Trader is a non-U.S. entity and does not have a U.S.-issued tax identification number, then the broker-dealer would only need to maintain the entity's name, address, and date the account was opened.

[220] The legislative history indicates Congress's expectation that the Commission, in implementing a large trader reporting system, ''would not impose requirements on broker-dealers to report beneficial ownership information that is not recorded in the normal course of business.'' Senate Report, *supra* note 14, at 42. The Committee specifically noted that many broker-dealers did not maintain beneficial ownership records of transactions of foreign persons that are carried out through banks, particularly foreign banks, which serve as the record holder of such securities. *See id.* The Committee expected that such beneficial owners would not be assigned LTIDs. *See id.* As discussed above, for all persons (both foreign and domestic), large trader status is triggered by the exercise of investment discretion, not mere beneficial ownership of NMS securities.

[221] 15 U.S.C. 78mm.

[222] A registered broker-dealer, however, would remain subject to the recordkeeping, reporting, and monitoring provisions of the Rule with respect to any Unidentified Large Traders independent of whether any such entity had received an exemption from the requirements to file Form 13H with the Commission.

[223] *See* European Banking Federation and Swiss Bankers Association Letter at 3; T. Rowe Price Letter at 2; and Financial Engines Letter at 4.

[224] *See supra* at Section III.A.3.0.

[225] *See* European Banking Federation and Swiss Bankers Association Letter at 2.

[226] *See id.* at 4 (discussing the challenges associated with foreign large traders providing account information).

such information to the Commission or self-regulatory organizations; and (C) the relationship between the United States and international securities markets.[227] These considerations have informed this final rule, as discussed below.

1. Existing Reporting Systems

Currently, the Commission collects transaction data from registered broker-dealers through the EBS system.[228] At present, neither the EBS system nor any other source of data available to the Commission allows it to definitively identify traders that conduct a substantial amount of trading activity or assess the impact of their activities on the securities markets.

Rule 13h–1 is focused on collecting information about large traders through modifications to existing EBS systems. Specifically, the Rule will provide the Commission with background information about all large traders through Form 13H submissions,[229] and will allow the Commission to obtain information on their transactions through the requirement on registered broker-dealers to track large trader trades according to the trader's LTID. Moreover, by requiring registered broker-dealers to collect and report (upon request) the execution time of all large trader transactions, the Commission is significantly enhancing its ability to investigate trading. Accordingly, the Commission believes that this new rule, which will be implemented through modifications to existing EBS systems, is narrowly tailored to address specific regulatory interests by requiring the disclosure of information that is not otherwise collected.[230]

2. Costs Associated With Maintaining and Reporting Large Trader Transaction Data

As discussed in detail below,[231] the Commission considered the costs associated with maintaining and reporting the large trader transaction data required under the Rule by registered broker-dealers. In particular, as discussed below, the Commission has designed the proposed rule to minimize the burdens of the large trader reporting requirements on both large traders and registered broker-dealers.

3. Relationship Between U.S. and International Securities Markets

In adopting Rule 13h–1 and Form 13H, the Commission is mindful of the danger of disadvantaging U.S. securities markets vis-á-vis foreign securities markets. In the Proposing Release, the Commission expressed concern that excluding foreign large traders from the proposed rule's requirements could create a competitive disparity between domestic markets and persons and foreign markets and persons.[232] Commenters raised issues about the application of the Rule to foreign entities, which are addressed above.[233]

The Commission solicited comment specifically about: whether the proposed rule might incentivize trading through certain market centers; whether large traders would effect their trades through entities other than registered broker-dealers (*e.g.,* foreign brokers); whether large traders might trade increasingly in foreign jurisdictions to evade the proposed reporting requirements; whether the proposed treatment of foreign entities is appropriate; the extent to which foreign statutes complicate foreign large traders' ability to comply with the proposed rule; and whether the proposal would have any unintended negative consequences for the U.S. markets.[234] The Commission received few comments that specifically addressed these topics.

One commenter warned that, to the extent that registered broker-dealers incur higher costs as a result of the complying with the Rule, the Rule may result in some brokerage business being driven offshore to foreign brokers who will not bear the same compliance burden.[235] As discussed above, the Commission clarified the extent and nature of the monitoring responsibilities applicable to registered broker-dealers and does not believe that the limited, high-level monitoring requirements would impose a cost so high as to drive business offshore. Further, as discussed in the Proposing Release and further below, the Commission believes that the Rule has been narrowly tailored to produce a core set of information necessary for the Commission to effectuate its authority under Section 13(h) of the Exchange Act in a manner that only results in minimal increased costs and burdens.

Another commenter suggested that the Rule may shift business away from trading in NMS securities and to other financial products that are not subject to the large trader reporting requirements but that allow market participants to undertake economically equivalent positions.[236] Specifically, the commenter asserted that market participants may gain the equivalent exposure through European Depositary Receipts, Global Depositary Receipts, European exchange-traded funds, futures, and swaps and that, if the Rule is adopted, it may cost less to use these alternatives than to invest directly in NMS securities.[237] The commenter provided no data to support its position and did not take into account the liquidity profiles or transaction cost differences among those alternatives. The Rule is designed to be minimally burdensome both to large traders and the registered broker-dealers who must record and report trading information. The Commission also notes that the costs associated with some of the alternatives identified by the commenter may soon change. For example, Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act[238] directs the Commission and the CFTC to regulate over-the-counter derivatives. Thus, these investments will be subject to regulation and oversight that have not applied in the past. In addition, the CFTC has a large trader reporting regime that currently applies to traders and transactions that are subject to the CFTC's regulatory authority. The Senate Report that accompanied the Market Reform Act observed that the U.S. futures markets, where reporting of large futures positions is required, have not been competitively disadvantaged by the CFTC's large trader reporting system, and that participants in those U.S. markets have generally not left for foreign markets.[239] On balance, as discussed further below, the Commission believes that the costs associated with Rule 13h–1 will not negatively impact the attractiveness of U.S. securities markets, capital formation in the U.S.,[240] or the

[227] *See* Section 13(h)(5) of the Exchange Act, 15 U.S.C. 78m(h)(5).

[228] *See* 17 CFR 240.17a–25 (Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers). *See also* Rule 17a–25 Release, *supra* note 19.

[229] *See supra* Section 0.

[230] The Commission notes that Form 13H requires a large trader to identify other forms it and its Securities Affiliates file with the Commission. As discussed above, this disclosure is designed to facilitate and expedite investigations connected to large traders.

[231] *See infra* Section 0.

[232] *See* Proposing Release, *supra* note 3, 75 FR at 21471.

[233] *See supra* Section III.0.

[234] *See* Proposing Release, *supra* note 3, 75 FR at 21473, 21482.

[235] *See* Prudential Letter at 2, n.4.

[236] *See* European Banking Federation and Swiss Bankers Association Letter at 4–5.

[237] *See id.*

[238] Public Law No. 111–203 (July 21, 2010).

[239] *See* Senate Report, *supra* note 14, at 42.

[240] The Senate Committee on Banking, Housing and Urban Affairs expected the Commission, in adopting any direct reporting rules, to consider carefully the total impact of such rules on capital formation in the U.S. *See id.*

competitive position of U.S. market participants.

E. Implementation and Compliance Dates, Exemptive Authority

The Commission proposed that the broker-dealer recordkeeping requirements contained in Rule 13h–1(d) and the reporting requirements contained in Rule 13h–1(e) would become effective six months after adoption of a final rule.[241] In the Proposing Release, the Commission solicited comment regarding the proposed implementation period.[242] The few commenters who specifically responded to this inquiry expected that it would take longer than six months to implement the necessary system changes.[243] One commenter suggested that 18 months would be a more appropriate implementation period to accommodate the system changes and testing required to implement the proposed T+1 reporting requirement.[244]

After considering the comments, the Commission continues to believe that, because the Rule utilizes the existing EBS system infrastructure, broker-dealers should be able to enhance their existing recordkeeping and reporting systems to meet the requirements of the proposed large trader rule within a relatively short time period. Nevertheless, to accommodate commenters' requests for more time to test and implement their systems, the Commission is adopting an implementation date for the requirements applicable to registered broker-dealers three months later than proposed. The Commission believes that this additional time should allow registered broker-dealers to plan, design, implement, and test the small number of enhancements to their existing transaction reporting systems required by the Rule. Accordingly, the deadline for implementing the recordkeeping and reporting requirements applicable to registered broker-dealers is seven months after the Effective Date of the Rule.[245]

The Commission also proposed that the self-identification requirements for large traders under Rule 13h–1(b) would become effective three months after adoption of a final rule.[246] In the Proposing Release, the Commission requested comments about whether that implementation period was sufficient.[247] A number of commenters suggested lengthening the three-month implementation period, recommending either 12 months[248] or 18 months.[249] Two commenters[250] suggested that the self-identification requirements should be delayed until the Commission is prepared to receive electronic Forms 13H.[251]

As discussed above, the Commission has streamlined the Form 13H from the proposed version to minimize the reporting burdens. For example, the Commission did not adopt the most detailed question in the proposed Form that would have required large traders to identify all of the brokerage account numbers through which they trade. With these changes from the proposal, the Commission believes that the three-month time frame provides large traders adequate time to gather together the information required by the Form. Further, the Commission expects that its electronic filing system will be operational and capable of receiving fully-electronic Form 13H filings by the proposed compliance date. Nevertheless, to accommodate commenters' requests for more time, the Commission is adopting a longer compliance date for large traders. Accordingly, the self-identification requirement for large traders will commence two months after the Effective Date of the Rule.[252]

Section 13(h)(6) of the Exchange Act[253] authorizes the Commission ''by rule, regulation, or order, consistent with the purposes of this title, [to] exempt any person or class of persons or any transaction or class of transactions, either conditionally or upon specified terms and conditions or for stated periods, from the operation of [Section 13(h)], and the rules and regulations thereunder.'' Rule 13h–1(g) implements this authority, providing that: ''[u]pon written application or upon its own motion, the Commission may by order exempt, upon specified terms and conditions or for stated periods, any person or class of persons or any transaction or class of transactions from the provisions of this rule to the extent that such exemption is consistent with the purposes of the Securities Exchange Act.''

The Commission requested comment about whether certain categories of persons (such as floor brokers, specialists, and market makers) should be exempted from the proposed rule.[254] One commenter suggested exempting persons whose trading activities are an ancillary activity in support of a core charitable purpose.[255] The commenter asserted that such non-profit entities generally are infrequent traders, and that the Rule is designed to capture the activities of frequent traders.[256]

As discussed above, frequency of trading alone does not affect whether a person is a large trader.[257] Non-profit organizations may engage in arm's-length purchases and sales of NMS securities in the secondary market, and their transactions may involve the exercise of investment discretion. Therefore, at this time, the Commission does not believe that a blanket exemption for such entities is appropriate.

The Commission notes, as discussed above, that any entity that merely beneficially owns NMS securities would not qualify as a large trader; only an entity that exercises investment discretion, directly or indirectly, on behalf of itself or others (*e.g.,* a registered investment adviser or a pension fund manager), and effects transactions equal to or greater than the identifying activity level, can qualify as a large trader.

IV. Paperwork Reduction Act

The Rule contains ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[258] In accordance with 44 U.S.C. 3507 and 5 CFR 1320.11, the Commission submitted the provisions to the Office of Management and Budget (''OMB'') for review. The title for the proposed collection of information requirement, including proposed Rule 13h–1 and proposed Form 13H, is ''Information Required Regarding Large Traders Pursuant to Section 13(h) of the Securities Exchange Act of 1934 and Rules Thereunder.'' An agency may not conduct or sponsor, and

[241] *See* Proposing Release, *supra* note 3, 75 FR at 21471.

[242] *See id.* at 21473.

[243] *See* Financial Information Forum Letter at 7 and SIFMA Letter at 6.

[244] *See* SIFMA Letter at 19.

[245] The Effective Date of the Rule, as noted above, is 60 days after publication in the Federal Register.

[246] *See* Proposing Release, *supra* note 3, 75 FR at 21471.

[247] *See id.* at 21473.

[248] *See* Prudential Letter at 5; Investment Adviser Association Letter at 9; and Investment Company Institute Letter at 12.

[249] *See* SIFMA Letter at 19.

[250] *See* T. Rowe Price Letter at 3 and Investment Adviser Association Letter at 9–10.

[251] In the Proposing Release, the Commission mentioned the possibility that large traders might be required to file Forms 13H in paper form in the event that the agency's electronic filing system is not operational as of the implementation deadline. *See* Proposing Release, *supra* note 3, 75 FR at 21465.

[252] The Effective Date of the Rule, as noted above, is 60 days after publication in the Federal Register.

[253] 15 U.S.C. 78m(h)(6).

[254] *See* Proposing Release, *supra* note 3, 75 FR at 21473.

[255] *See* Howard Hughes Medical Institute Letter at 2.

[256] *See id.* at 1.

[257] *See supra* text following note 60.

[258] 44 U.S.C. 3501 *et seq.*

a person is not required to respond to, a collection of information unless it displays a currently valid control number.

In the Proposing Release, the Commission solicited comment on the collection of information requirements. The Commission noted that the estimates of the effect that the Rule would have on the collection of information were based on the Commission's experience with similar reporting requirements. As discussed above, the Commission received 87 comment letters on the proposed rulemaking. Various commenters addressed the collection of information aspects of the proposal.[259]

A. Summary of Collection of Information

Under Rule 13h–1, a ''large trader'' is any person that directly or indirectly, including through other persons controlled by such person, exercises investment discretion over one or more accounts and effects transactions for the purchase or sale of any NMS security for or on behalf of such accounts, with or through one or more registered broker-dealers, in an aggregate amount equal to or greater than the identifying activity level.

All large traders will be required to identify themselves to the Commission by filing Form 13H and will be required to update their Form 13H from time to time.[260] Upon receiving an initial Form 13H, the Commission will assign to the large trader a unique LTID. Each large trader will be required to disclose to registered broker-dealers effecting transactions on its behalf its LTID and each account to which it applies.[261] In addition, upon request by the Commission, a large trader will be required promptly to provide additional information to the Commission that will allow the Commission to further identify the large trader and all accounts through which the large trader effects transactions.[262]

As discussed above, in response to comments, the Commission has adopted Form 13H without the proposed requirement that large traders report their broker-dealer account numbers on Form 13H. Instead, large traders will be required to report a list of broker-dealers with whom they have an account. As a consequence, as discussed above, large traders will not have to report on Form 13H the LTID of any unaffiliated large trader with whom they share investment discretion, as that proposed requirement was connected to the identification of accounts.

Rule 13h–1 also imposes recordkeeping, reporting, and monitoring requirements on registered broker-dealers. Paragraph (d)(1) of the Rule requires every registered broker-dealer to maintain records of all information required under paragraphs (d)(2) and (d)(3) for all transactions effected directly or indirectly by or through (i) an account such broker-dealer carries for a large trader or an Unidentified Large Trader or (ii) if the broker-dealer is a large trader, any proprietary or other account over which such broker-dealer exercises investment discretion.[263] Additionally, where a non-broker-dealer (such as a bank) carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting transactions directly or indirectly for such person must maintain records of all of the information required under paragraphs (d)(2) and (d)(3) for those transactions. The term ''Unidentified Large Trader'' is defined to mean each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of the Rule that a registered broker-dealer knows or has reason to know is a large trader. For purposes of determining under the Rule whether a registered broker-dealer has reason to know that a person is a large trader, a registered broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer.[264] Further, a registered broker-dealer will be deemed not to know or have reason to know that a person is a large trader if it establishes policies and procedures reasonably designed to assure compliance with the identification requirements and does not have actual knowledge that a person is a large trader.[265] In response to comments, the Commission clarified that a broker-dealer need only look to aggregate transactions it effected for its customer in assessing whether a person may be an Unidentified Large Trader. The Commission also clarified that even if a person's transactions at a broker-dealer meet the applicable identifying activity threshold, the customer might or might not be a large trader under Rule 13h–1, and the person itself is responsible for determining whether it is a large trader.[266]

Complementing the recordkeeping requirements on broker-dealers, Rule 13h–1(e) requires registered broker-dealers that are required to keep records pursuant to paragraph (d)(1) to report that information to the Commission upon request.[267] Specifically, upon the request of the Commission, a registered broker-dealer must report electronically, in machine-readable form and in accordance with instructions issued by the Commission, all information required under paragraphs (d)(2) and (d)(3) for all transactions effected directly or indirectly by or through accounts carried by such broker-dealer for large traders and other persons for whom records must be maintained, equal to or greater than the reporting activity level.[268]

Broker-dealers will need to report a particular day's trading activity only if it equals or exceeds the ''reporting activity level.'' While a registered broker-dealer is required to report data for a given day only if it is equal to or greater than the reporting activity level, the Rule specifically allows a broker-dealer to voluntarily report a day's trading activity that falls short of the applicable threshold. Registered broker-dealers may wish to take this approach if they prefer to avoid implementing systems to filter the transaction activity and would rather utilize a ''data dump'' approach to reporting large trader transaction information to the Commission. Further, as discussed above, the Commission clarified in response to comments that while a person need not count trading activity that falls within one of the listed categories of excluded transactions when it determines whether it meets the

[259] *See, e.g.,* Managed Funds Association Letter, Prudential Letter, Investment Adviser Association Letter, Wellington Management Letter, Investment Company Institute Letter.

[260] *See* new Rule 13h–1(b).

[261] *See* new Rule 13h–1(b)(2).

[262] *See* new Rule 13h–1(b)(4).

[263] A broker-dealer that exercises discretion over an account with someone else would know that that person is an Unidentified Large Trader based on the transactions effected through that jointly managed account.

[264] *See* new Rule 13h–1(a)(9) (defining ''Unidentified Large Trader'').

[265] *See* new Rule 13h–1(f) (the monitoring safe harbor). The policies and procedures contemplated by the safe harbor contemplate systems that are reasonably designed to detect and identify a large trader based upon transactions effected through an account or groups of accounts considering the identity of the trader by using information readily available to the broker-dealer, such as name or tax identification number.

[266] For example, the customer might have effected transactions that, for purposes of determining whether a person is a large trader, are excluded from consideration under new Rule 13h–1(a)(6), in which case the customer would not qualify as a ''large trader'' based solely on those transactions.

[267] *See* new Rule 13h–1(e).

[268] In addition to reporting transaction data on large traders, the Rule requires broker-dealers to report transaction data for Unidentified Large Traders, along with additional information to help the Commission identify the Unidentified Large Trader. Specifically, paragraph (e) of the Rule requires broker-dealers to maintain and report for Unidentified Large Traders such person's name, address, date the account was opened, and tax identification number(s). *See also* new Rule 13h–1(d)(3).

applicable identifying activity threshold, a broker-dealer must report all transactions that it effected through the accounts of a large trader without reference to or exclusion of any transactions listed in Rule 13h–1(a)(6).

In recognition of the value of utilizing existing reporting systems,[269] the Rule requires broker-dealers to transmit the transaction records to the Commission utilizing the infrastructure of the existing EBS system. With respect to timing, Section 13(h)(2) of the Exchange Act provides that records of a large trader's transactions must be made available on the morning after the day the transactions were effected.[270] Rule 13h–1 incorporates this requirement in paragraph (d)(5). Therefore, transaction reports, including data on transactions up to and including the day immediately preceding the request, will need to be submitted to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested. Paragraph (d)(4) of the Rule requires that such records be kept for a period of three years, the first two in an accessible place, in accordance with Rule 17a–4 under the Exchange Act.[271]

B. Use of Information

The Commission will use the information collected pursuant to Rule 13h–1 to identify significant market participants and collect data on their trading activity. The large trader reporting requirements will provide the Commission with access to a new data source that will contribute to its ability to conduct investigations and enforcement matters, as well as analyze market activity, and should enhance its ability to assess the impact of large traders on the securities markets. It also will facilitate the Commission's trading reconstruction efforts, as transaction data that will be reported to the Commission pursuant to Rule 13h–1 will include the time of execution of the order as well as the identity of the large trader that effected the trade.

Registered broker-dealers will use the information they collect pursuant to Rule 13h–1, including LTID numbers, to comply with the requirement of the Rule to report to the Commission upon request all transactions they effect for large traders. In addition, registered broker-dealers that take advantage of the monitoring safe harbor will use the information they collect pursuant to Rule 13h–1 in connection with their policies and procedures under the Rule to monitor for Unidentified Large Traders and inform them of their potential obligations under Rule 13h–1. Registered broker-dealers also will be required to disclose the additional information they collect on Unidentified Large Traders pursuant to Rule 13h–1(d)(3) to the Commission upon request.

C. Respondents

In the Proposing Release, the Commission estimated that the ''collection of information'' associated with the Rule would apply to approximately 400 large traders and 300 registered broker-dealers. In the Proposing Release, the Commission solicited comment on the estimated number of respondents. Several commenters believed that the Commission's estimated number of respondents appeared to be too low, though few provided data or analysis to support their conclusions.[272] For the reasons discussed below, the Commission continues to believe that the Rule will affect approximately 400 large traders and 300 registered broker-dealers.

1. Number of Large Traders

The estimated number of large traders was based on Commission experience in reviewing EBS data and overseeing market participants. Notably, the estimate reflects Rule 13h–1(b)(3) filing requirement provisions, which focus, in more complex organizations, on the parent company of the entities that employ or otherwise control the individuals that exercise investment discretion. One commenter believed that the estimate of 400 large traders was underestimated and that the proposed thresholds may capture more than 400 large traders, including especially infrequent large traders, based on the proposed identifying activity level.[273] In particular, the commenter argued that the rule should not impose a self-identification requirement on traders that only infrequently trade in substantial volume.[274] The Commission agrees with this view, which reflects some of the considerations that informed the Commission's proposed provision for inactive status, which it is adopting. As discussed above, inactive status is designed to reduce the burden on infrequent traders who may trip the large trader threshold on a particular occasion but who do not regularly trade at sufficient levels to otherwise warrant the regulatory requirements under the Rule. Inactive status relieves the large trader from the requirement to file amended Forms 13H. However, as discussed above, even where a market participant trades in an amount that reaches the identifying activity threshold only infrequently—which at those times nonetheless would represent a substantial amount of trading activity relative to overall market volume—the Commission seeks to identify that participant as a large trader at those times so as to be able to obtain information about the participant. In light of the proposed provision for inactive status, which the Commission is adopting as proposed, the Commission's original estimate of 400 large traders accounted for traders that only infrequently trade in excess of the proposed identifying activity threshold, which the Commission also is adopting as proposed.

The Commission continues to believe that the estimate of 400 large traders is appropriate for other reasons. The estimate reflects the Rule's focus on identification and registration of large traders at the parent company level. As noted in the Proposing Release, the purpose of this focus is to narrow the number of persons that will need to self-identify and register on Form 13H as ''large traders,'' thereby allowing the Commission to identify the primary institutions that conduct a large trading business. One commenter believed that the number was underestimated and that 400 option traders alone would qualify as large traders.[275] However, this concern does not reflect the fact that the Rule contemplates registration as a large trader at the parent company level. Most, if not all, large trader control groups, as a natural consequence of their substantial trading and hedging activities, would involve persons that are active across a broad array of financial products trading in multiple venues, including cash equities and derivatives. The Commission's estimate, which was based on its experience with EBS data, takes into account this fact. Accordingly, the estimate does not separately count the number of subsidiary traders that conduct an options business (or any other securities

[269] As noted above, in connection with exercising rulemaking authority under Exchange Act Section 13(h), the Commission must consider existing reporting systems. *See supra* Section III.0.

[270] *See* 15 U.S.C. 78m(h)(2). *See also* discussion *supra* at Section III.B.2 (concerning reporting requirements).

[271] 17 CFR 240.17a–4.

[272] *See, e.g.,* Investment Adviser Association Letter at 10; Managed Funds Association Letter at 2; SIFMA Letter at 7; and Financial Information Forum Letter at 5–6.

[273] *See* Managed Funds Association Letter at 2.

[274] *See id.*

[275] *See* SIFMA Letter at 7.

business) as separate from the number of large trader complexes since the estimated number of large traders considers that large traders will identify at the parent company level, which is generally less burdensome than registering at the subsidiary level, as discussed above.

In addition, as discussed above, in response to comments the Rule as adopted allows a large trader to voluntarily register with the Commission, even before it meets the applicable trading activity threshold, in order to eliminate its need to actively monitor its trading levels.[276] The Commission is not adjusting its estimate of the number of large traders to account for such voluntary registrations because it expects that only persons whose trading activity would eventually equal or exceed the identifying activity level will take advantage of this new provision. In other words, the Commission expects that the only persons who would take advantage of the voluntary registration provision are persons that wish to avoid the burdens of monitoring their trading activity where such trading generally meets or exceeds the identifying activity threshold—that is, who in fact will be large traders. Accordingly, the Commission's original estimate of 400 large traders already includes persons who might consider voluntary registration because such persons were effectively deemed to be large traders for purposes of that estimate.

2. Number of Broker-Dealers Affected

In the Proposing Release, the Commission estimated that 300 registered broker-dealers would be subject to the recordkeeping, reporting, and monitoring requirements of the rule. This estimate was based on broker-dealer responses to FOCUS report filings with the Commission made in 2009. This estimate reflected the number of broker-dealer carrying firms that the Commission believes would carry accounts for large traders or that would effect transactions directly or indirectly for a large trader or an Unidentified Large Trader where a non-broker-dealer carries the account.

One commenter thought that the Commission's broker-dealer estimate of 300 broker-dealers was underestimated and believed that the number of broker-dealers affected by the monitoring requirements might be closer to 1,500.[277] This commenter, whose analysis was based on the monitoring safe harbor provisions of the proposed rule, expressed concern with the reference to ''other readily available information'' contained in the proposed safe harbor. The commenter explained that ''other readily available information might only be available at the introducing broker-dealer, and therefore clearing firms might reasonably require the broker-dealers that introduce customer accounts to them to implement their own policies and procedures * * *''.[278] Thus, the commenter's assertion was based on a belief that, though the Rule itself would not specifically require it, carrying broker-dealers might, in turn, require their introducing broker correspondents to establish policies and procedures to collect information on Unidentified Large Traders required by the Rule to assist the clearing firms in complying with the requirements of the Rule that are applicable to them.[279] The commenter's estimate of 1,500 entities was based on the fact that approximately 1,657 FINRA members have been assigned MPIDs as of June 2010.[280]

The Commission is mindful of this commenter's concern and has clarified in the adopted monitoring safe harbor provision of Rule 13h–1(f) the more limited scope intended of ''other identifying information'' that a broker-dealer would need to consider. Specifically, as adopted, the safe harbor policies and procedures would need to be reasonably designed to identify Unidentified Large Traders based only on accounts at the broker-dealer. In assessing which accounts to consider, the Rule, as adopted, clarifies that the broker-dealer's policies and procedures should consider account name, tax identification number, or other identifying information ''available on the books and records of such broker-dealer.'' The broker-dealer's safe harbor policies and procedures would not need to take into account identifying information on the books and records of another broker-dealer. The Commission believes it has addressed the commenter's concerns by clarifying in the adopted Rule that the approximately 300 brokers affected by this Rule would not be required to consider information that would otherwise have required, as estimated by the commenter, as many as 1,500 broker-dealers that introduce customer accounts to implement their own policies and procedures.

In addition, the Commission believes that large traders, whose aggregate NMS securities transactions equal or exceed the identifying activity level, require sophisticated trade-processing capacities. Accordingly, it is unlikely that 1,500 broker-dealers that have been assigned an MPID either carry accounts for or will effect a transaction on behalf of a large trader because not all such entities will have, or will be in the business of, effecting trades for large traders. For example, one commenter, a large investment management firm and likely large trader, reported that it currently has ''approximately 250 broker-dealers on our approved list for executing equity transactions''.[281] This number is lower than the Commission's estimate of 300 affected broker-dealers.

Further, as discussed above, in considering whether a broker-dealer has ''reason to know'' that a person is a large trader, the broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer.[282] Moreover, a broker-dealer may determine that it has no ''reason to know'' that a person is a large trader through two methods. First, the broker-dealer may rely on the safe harbor of Rule 13h–1(f). Alternatively, however, a broker-dealer may simply conclude, based on its knowledge of the nature of its customers and their trading activity with the broker-dealer, that it has no reason to expect that any of these customers' transactions approach the identifying activity level. Accordingly, an introducing broker-dealer whose customers do not effect transactions in NMS securities by or through it at levels close to the identifying activity level could simply draw such conclusion and would not need to implement any new policies and procedures.

Therefore, for the reasons described above, all 1,500 entities are not expected to be impacted by the monitoring provisions of Rule 13h–1(f) and the Commission continues to believe that its initial estimate of 300 affected broker-dealers is appropriate consistent with the additional guidance provided in Rule 13h–1(f), as adopted.[283] As discussed above, the Commission's estimate of 300 broker-dealers was based on broker-dealer responses to FOCUS report filings with the

[276] *See supra* text accompanying note 115 (for a discussion of voluntary filing).

[277] *See* Financial Information Forum Letter at 6. The commenter focused its comment on the proposed monitoring requirement.

[278] *See id.*

[279] *See id.*

[280] *See id.*

[281] *See* Wellington Management Letter at 3.

[282] Section III.B.3 (discussing the monitoring requirements).

[283] To the extent that a broker-dealer that is subject to the monitoring requirements requires, by contract or otherwise, an entity that is not otherwise subject to the Rule's monitoring requirements to nevertheless perform a monitoring function, the Commission's estimate does not account for that situation.

Commission, and reflected the number of broker-dealers that the Commission believes would be reasonably likely to carry accounts for large traders or that would be reasonably likely to effect transactions directly or indirectly for a large trader where a non-broker-dealer carries the account.

Further, as discussed above, the Commission received a comment letter from a broker-dealer that operates an ATS inquiring whether the requirement to monitor for Unidentified Large Traders would extend to other registered broker-dealers, including a broker-dealer that operates an ATS.[284] The monitoring requirements are applicable to registered broker-dealers that are large traders, carry accounts for large traders or Unidentified Large Traders, or effect transactions on behalf of large trader customers whose accounts are carried by non-broker-dealers. If an ATS is not operating in those capacities, then it is not subject to the monitoring requirements. The Commission does not expect ATSs to act in these capacities, and so the Commission is not amending its estimate of the number of affected registered broker-dealers to include ATSs.

D. Total Initial and Annual Burdens

1. Burden on Large Traders

a. Duties of Large Traders

Rule 13h–1 will present new burdens to persons that meet the definition of large trader. In particular, persons, including those that might not presently be registered with the Commission in some capacity, that meet the definition of ''large trader'' will become subject to a new reporting duty, as the Rule will require each large trader to identify itself to the Commission by filing a Form 13H and submitting annual updates, as well as updates on as frequently as a quarterly basis when necessary to correct information previously disclosed that has become inaccurate. Additionally, each large trader will be required to identify itself to each registered broker-dealer through which it effects transactions. As discussed above, however, the Commission did not adopt the proposed requirement that large traders disclose their LTIDs to others with whom they collectively exercise investment discretion.[285]

Paragraph (b)(1) of the Rule requires large traders to file Form 13H with the Commission promptly after first effecting transactions that reach the identifying activity level.[286] Thereafter, large traders are required to file an amended Form 13H promptly following the end of a calendar quarter in the event that any of the information contained therein becomes inaccurate for any reason (*e.g.,* change of contact information, type of organization, trading strategy, regulatory status, list of broker-dealers at which the large trader has an account, or description of affiliates).[287] Regardless of whether any amended Forms 13H are filed, large traders also are required to file Form 13H annually, within 45 days after the calendar year-end, in order to ensure the accuracy of all of the information reported to the Commission.[288] Additionally, Rule 13h–1(b)(4) provides that the Commission may require large traders to provide, upon request, additional information to identify the large trader and all accounts through which the large trader effects transactions. Such requests for additional information may include, for example, a disaggregation request to assist the Commission in identifying accounts through which a large trader effects specific transactions.

b. Initial and Annual Burdens

In the Proposing Release, the Commission estimated that it would take a large trader approximately 20 hours to calculate whether its trading activity qualifies it as a large trader, complete the initial Form 13H with all required information, obtain a LTID from the Commission, and inform its registered broker-dealers and other entities of its LTID and the accounts to which it applies. The Commission based this estimate on its understanding that large traders currently maintain systems that capture their trading activity and that these existing systems would be sufficient without further modification to enable a large trader to determine whether it effects transactions for the purchase or sale of any NMS security for or on behalf of accounts over which it exercises investment discretion in an aggregate amount equal to or greater than the identifying activity level. Accordingly, the Commission estimated that the one-time burden for large traders would be approximately 8,000 burden hours.[289]

The Commission also estimated that the ongoing annualized burden for complying with proposed Rule 13h–1 would be approximately 6,800 burden hours for all large trader respondents.[290] This figure was based on the estimated number of hours it would take to file any amendments as well as the required annual update to Form 13H. The Commission estimated that the average large trader would be required to file one annual update and three amended updates annually.[291]

Several commenters believed that the Commission underestimated the burden hour estimates for large traders.[292] Some commenters suggested that large trader organizations may need to develop integrated systems in order to accomplish parent company-level reporting, and correspondingly asserted that the estimate should account for this.[293] As described below, however, a parent company need only add together the aggregate gross trading activity of its subsidiaries when it calculates whether it has reached the identifying activity level and need not integrate trading or other systems. In addition, importantly, with respect to the information that must be assembled and reported on the Form that would require the development of an integrated system, as discussed directly below, the Commission has not adopted what commenters identified as the single most burdensome item—the reporting of

[284] *See* GETCO Letter at 3.

[285] *See supra* text following note 106 (for a discussion of the change).

[286] *See* new Rule 13h–1(b)(1)(i).

[287] *See* new Rule 13h–1(b)(1)(iii).

[288] *See* new Rule 13h–1(b)(1)(ii).

[289] The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including those required by Rule 13f–1: (Compliance Manager at 3 hours) + (Compliance Attorney at 7 hours) + (Compliance Clerk at 10 hours) × (400 potential respondents) = 8,000 burden hours. Rule 13f–1, like new Rule 13h–1, requires monitoring of a certain threshold and, upon reaching that threshold, disclosure of information.

[290] The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f–1 and Rule 17a–25: (Compliance Manager at 2 hours) + (Compliance Attorney at 5 hours) + (Compliance Clerk at 10 hours) × (400 potential respondents) = 6,800 burden hours. Rule 13f–1, like new Rule 13h–1, requires monitoring of a certain threshold and, upon reaching that threshold, disclosure of information. As discussed above, Rule 17a–25 requires broker-dealers to disclose information that is very similar in scope and character to the information required under new Rule 13h–1. The Commission believed that determining whether a firm reaches the identifying activity level was a compliance function and that no software reprogramming would be required.

[291] This estimate was based on the varied characteristics of large traders and the nature and scope of the items that would be disclosed on proposed Form 13H that would require updating and considered that large traders would file one required annual update and three quarterly updates when information contained in the Form 13H became inaccurate.

[292] *See, e.g.,* Prudential Letter; Investment Adviser Association Letter; and Investment Company Institute Letter.

[293] *See* Prudential Letter at 5; Investment Adviser Association Letter at 7–8; and Investment Company Institute Letter at 4–5, 9.

brokerage account numbers. Instead, the Form, as adopted, requires large traders to disclose only basic identifying information, such as a list of affiliates and a list of broker-dealers at which it has accounts, and would not require the development of integrated systems to track brokerage account numbers across subsidiaries.

Several commenters indicated that the proposed requirement to report account numbers and names could be unduly burdensome.[294] These commenters, notably the investment advisers, expressed concern over potential burden on large traders associated with reporting brokerage account numbers. One commenter noted that it has more than 400,000 separate broker-dealer account numbers associated with its clients that reside on the systems of the broker-dealers with whom it transacts.[295] This commenter stated that it does not track or maintain a list of these internal broker-dealer account numbers and does not utilize these account numbers when communicating with broker-dealers about trades.[296]

Another commenter suggested that account information may not be on the premises of the large trader and that, even if it were, this data would not be in automated form that is amenable to reporting on Form 13H.[297] One commenter explained that many investment advisers do not know the account numbers assigned to them by their broker-dealers because that information is not required by the software they use to communicate order allocation and settlement instructions to broker-dealers.[298] Another commenter stated that many investment advisers have a large number of discretionary advisory clients and effect transactions on behalf of such clients through a substantial number of different broker-dealers, through multiple prime brokers, and, in the case of multi-managed accounts, in concert with other advisers.[299] This commenter stated that the proposal assumes that for each advisory client, the investment adviser can easily identify brokerage accounts by name and number.[300] This commenter stated that in practice, however, each transaction can be executed on behalf of many clients and that with respect to each such transaction, although a particular broker-dealer may have assigned an account number for its own internal recordkeeping purposes, the adviser does not have this information.[301]

Based on these comments, the Commission agrees that its proposal underestimated the burden hour estimates for large traders to report account numbers on Form 13H. In particular, the Commission based its initial burden estimate for reporting account numbers on its understanding that large traders have systems in place to readily track and manage their brokerage account numbers. According to certain commenters, particularly investment advisers, this may not be the case for some large traders, as some advisers rely on software to intermediate the process of communicating with their broker.[302] For these entities, the information may not be in a form that is amenable to reporting on the Form without the use of third-party software.[303]

As discussed above, the Commission is addressing these comments by not adopting the proposed requirement to report account numbers.[304] Instead, the Commission is requiring the large trader to disclose: (1) The names of broker-dealers with whom it has an account and (2) the types of brokerage services provided by those brokers. One commenter noted that many traders already maintain a list of approved broker-dealers in a readily accessible format, as they maintain approved broker-dealer lists in the ordinary course of business and have processes for adding and deleting broker-dealers as well as reviewing trades with a broker-dealer not on the approved list.[305] Requiring the reporting on the Form of a list of broker-dealers used, rather than all accounts held by each broker-dealer, will bring the compliance burden for many large traders that are investment advisers in line with the Commission's original estimate of burdens on large traders generally. Consequently, the estimated burdens on large traders under the Form are now in line with the requirements of the adopted Rule and Form.

With respect to the Commission's assumption that large traders will be able to utilize existing systems when considering their trading levels, one commenter stated that, in cases where a large trader is a parent company, the parent may not itself be carrying on any trading activity and, thus, will neither have the detailed knowledge about its subsidiaries' trading activities or the systems to capture the information required on Form 13H.[306] Another commenter stated that the burden of potentially needing to develop new systems would be increased for firms with complicated corporate structures.[307] This commenter noted that ''[m]any corporate groups maintain operational independence from their subsidiaries and that each affiliate may employ its own individual system, which may not communicate with other affiliates.'' [308] This commenter asserted that, as a result, the process for gathering information would have to be done on a manual basis until a system could be developed and that gathering information across multiple affiliates (both U.S. and non-U.S. entities) manually will place a tremendous burden on investment managers.[309] In addition, this commenter noted that compliance with the Rule would be more difficult for investment advisers in that they are required to maintain information barriers between different affiliates in their organizations.[310]

As discussed above, with respect to determining whether the identifying activity level is met, the Commission notes that parent companies need only collect and aggregate the *total* trading activity of those entities they control when determining whether they meet the applicable identifying activity level. To accomplish this, only summary statistics need to be produced to the parent company, which would be added together at the parent company level to determine whether the parent company complex meets the applicable identifying activity level threshold. In other words, each subsidiary will use existing systems to calculate its trading, and then will provide that information directly to the parent company. The

[294] *See, e.g.,* Wellington Management Letter and American Bankers Association Letter.

[295] *See* Wellington Management Letter at 3. *See also* American Bankers Association Letter at 2 (stating that it believes reporting account numbers and names is unduly burdensome because it may require the reporting of potentially thousands of brokerage accounts).

[296] *See* Wellington Management Letter at 3. *See also* Financial Engines Letter at 4–5 (stating that although investment advisers may execute trades with broker-dealers indirectly, the adviser does not technically maintain brokerage accounts with those broker-dealers and is therefore not privy to information about brokerage accounts).

[297] *See* Investment Company Institute Letter at 11.

[298] *See* Wellington Management Letter at 3–4. As an alternative to reporting the account number, the commenter suggested that an investment adviser report the codes utilized by its software solution to communicate with its broker-dealers.

[299] *See* Investment Company Institute Letter at 7–8.

[300] *See id.*

[301] *See id.*

[302] *See id.* at 8.

[303] *See, e.g.,* Investment Company Institute Letter and Wellington Management Letter.

[304] *See supra* Section III.A.3.0 (discussing account numbers).

[305] *See* Investment Company Institute Letter at 9.

[306] *See* Prudential Letter at 5.

[307] *See* Investment Adviser Association Letter at 2, 7–8.

[308] *See id.* at 8.

[309] *See id.*

[310] *See id.*

trading systems themselves need not be integrated to accomplish this task. This limited activity should not undermine existing firewalls, because information would not be shared among entities under common control but would only be shared with the parent company. In addition, general information such as ''Subsidiary XYZ executed $10,000,000 worth of transactions on Monday representing 750,000 shares'' that is communicated directly from the subsidiary to the parent company would be highly unlikely to undermine firewalls. Further, the calculation of trading volume only needs to be done until the entity meets the applicable identification activity level. Once the entity meets this level, it becomes a large trader and no longer needs to calculate its trading in this manner. To the extent a parent company complex wishes to avoid this process altogether, it may elect to register voluntarily as a large trader.

A few commenters believed that the proposed requirement to list affiliates that beneficially own, as well as exercise investment discretion over, NMS securities would be overly burdensome.[311] One commenter recommended that the requirement should apply to a smaller set of affiliates, namely only those affiliates that actually conduct trading in NMS securities.[312] Another commenter stated that large traders should only be obligated to identify other unaffiliated large traders if investment discretion is exercised collectively.[313] Two commenters asked the Commission to not require large traders to list bank and insurance regulators.[314] One commenter stated that listing all applicable regulators is likely to lead to the creation of an extensive list in the case of a diversified financial services company.[315] This commenter stated that it would be required to list approximately fifty insurance regulators for one subsidiary and more than 25 foreign regulators for its non-U.S. affiliates.[316] Another commenter stated that bank regulator information is unnecessary to meet the Rule's underlying purpose and that the Commission could seek this information from the federal banking regulators.[317] As discussed above, in adopting the Rule, the Commission limited the scope of affiliates about which it will collect information pursuant to Form 13H.[318] Specifically, the Commission did not adopt the requirement to disclose affiliates that merely beneficially own NMS securities and it did not adopt proposed Items 3(b) and (c) of the Form, which would have required the large trader to disclose whether it or any of its affiliates is a bank or an insurance company and identify each such entity and its respective regulators. The Commission anticipates that focusing the Rule's scope in this regard will reduce burdens on large traders to be in line with the Commission's original understanding, while enabling the Commission to focus on gathering the most relevant and useful information about large traders.

The Commission does not expect that the revisions to the Form, including eliminating the requirement to disclose certain affiliates and applicable bank and insurance regulators, discussed above, will materially affect the Commission's initial burden estimates. In particular, a full analysis of which affiliates need to be reported and disclosed would still need to be conducted, even though the scope of information that needs to be disclosed on Form 13H has been reduced from the proposal. The disclosure on the Form of bank and insurance regulators as proposed would have represented only a minimal additional burden, and such information would likely have been static and infrequently changed. Similarly, the Commission's decision to not adopt the requirement to disclose affiliates that merely beneficially own NMS securities likewise should not materially affect the estimated reporting burden because the Form, as adopted, now includes additional items such as the requirement to provide an organizational chart and to identify any affiliates that file separately and any affiliates that have been assigned an LTID suffix. The Commission carefully considered the changes to the Form in light of the comments received on the Form and the initial cost estimates, and believes that the removal of certain required information balances the addition of new required information of a similar scope so as to not affect the overall reporting burdens.

2. Burden on Registered Broker-Dealers

a. Recordkeeping

As part of the Commission's existing EBS system, pursuant to Rule 17a–25 under the Exchange Act, the Commission currently requires registered broker-dealers to keep records of most of the information for their customers that will be captured by Rule 13h–1.[319] The additional items of information that the Rule will capture are: (1) LTID(s) and (2) transaction execution time. Some registered broker-dealers will need to re-program their systems to capture execution time to the extent their systems do not already capture that information in a manner that is reportable pursuant to an EBS request for data. The Commission believes that the burdens of the Rule on registered broker-dealers will likely vary due to differences in their recordkeeping systems.

In the Proposing Release, the Commission estimated that all registered broker-dealers that either are large traders or have a customer base that includes large traders and Unidentified Large Traders would be required to make modifications to their existing systems to capture the additional data elements that were not currently captured by systems that comply with Rule 17a–25, including, for example, LTID numbers. The Commission estimated that the one-time, initial burden for registered broker-dealers for system development, including re-programming and testing of the systems to comply with the proposed rule, would be approximately 133,500 burden hours.[320] This figure

[311] *See* SIFMA Letter at 17; Wellington Management Letter at 5; Financial Information Forum Letter at 4; and Prudential Letter at 4.

[312] *See* SIFMA Letter at 17.

[313] *See* Wellington Management Letter at 5–6.

[314] *See* Prudential Letter at 4 and American Bankers Association Letter at 2.

[315] *See* Prudential Letter at 4.

[316] *See id.*

[317] *See* American Bankers Association Letter at 2.

[318] *See supra* Section III.A.3.0 (discussing Item 4 of the Form).

[319] *See* 17 CFR 240.17a–25. Pursuant to Rule 17a–25, broker-dealers are required to maintain the following information that will be captured by new Rule 13h–1: Date on which the transaction was executed; account number; identifying symbol assigned to the security; transaction price; the number of shares or option contracts traded and whether such transaction was a purchase, sale, or short sale, and if an option transaction, whether such was a call or put option, an opening purchase or sale, a closing purchase or sale, or an exercise or assignment; the clearing house number of such broker or dealer and the clearing house numbers of the brokers or dealers on the opposite side of the transaction; a designation of whether the transaction was effected or caused to be effected for the account of a customer of such broker or dealer, or was a proprietary transaction effected or caused to be effected for the account of such broker or dealer; market center where the transaction was executed; prime broker identifier; average price account identifier; and the identifier assigned to the account by a depository institution. For customer transactions, the broker-dealer is required to also include the customer's name, customer's address, the customer's tax identification number, and other related account information.

[320] The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f–1 and Rule 17a–25: (Computer Ops Dept. Mgr. at 30 hours) + (Sr. Database Administrator at 25 hours) + (Sr. Programmer at 150 hours) + (Programmer Analyst at 100 hours) + (Compliance Manager at 20 hours)

Continued

was based on the estimated number of hours for initial internal development and implementation, including software development, taking into account the fact that new data elements were required to be captured and would need to be available for reporting to the Commission as of the morning following the day on which the transactions were effected. The Commission noted that because broker-dealers already capture, pursuant to Rule 17a–25, most of the data that proposed Rule 13h–1 would capture, it did not expect broker-dealers to incur any hardware costs as existing hardware should be able to accommodate the additional two fields of information that would need to be captured.

In the Proposing Release, the Commission stated that the ongoing annualized expense for the recordkeeping requirement for registered broker-dealers would not result in a separate burden for purposes of the PRA, as registered broker-dealers already were required to provide to the Commission almost all of the proposed information for all of their customers pursuant to Rule 17a–25 under the Exchange Act. Moreover, the Commission stated that once a registered broker-dealer's system was updated to capture the additional two fields of information required by Rule 13h–1, the Commission did not believe that the additional fields would result in any ongoing annualized expense beyond what broker-dealers currently incur to maintain the existing EBS data that is required to be kept pursuant to Rule 17a–25.

In response to the Commission's recordkeeping burden estimates, one commenter believed that the Commission significantly underestimated the time and resources for broker-dealers to comply with the Rule.[321] In particular, the commenter stated that the build-out costs to update the EBS system to accommodate the two new items (LTID and execution time) would exceed the Commission's estimate of 133,500 burden hours.[322] Though the commenter did not provide a methodology for its estimate or provide a specific estimate of burden hours, it noted the following: ''Assuming that just the generation process alone would require three months of effort for each firm with an electronic blue sheets reporting responsibility and that conforming related systems would require additional time, and then multiplied across the approximately 300 broker-dealers that the SEC estimates would be subject to the proposed rule, the total build-out for the industry would require 75 years of effort on a cumulative basis.'' [323] The commenter noted that one potential major cost of implementing the recordkeeping requirement is that some broker-dealers do not have access to execution times in a manner that is readily reportable under the EBS infrastructure.[324] These broker-dealers, the commenter stated, would need to devote considerable resources to updating EBS to gather, process, and transmit such information.[325] The Commenter recommended using the OATS system maintained by FINRA instead of the EBS system for the large trader reporting rule and argued that using the OATS infrastructure would not be as ''onerous'' as modifying the existing EBS system.[326] However, the same commenter mentioned one firm it talked to that estimated that it would cost less and take 50 percent less time to build out the EBS system compared to expanding OATS.[327] The Commission believes the firm cited by the commenter supports the Commission's position that an expansion of the EBS system is a more cost effective option to leverage an existing reporting system for purposes of the large trader rule.

A separate commenter that represents a group that focuses on technological aspects of securities regulation expressed concern with the proposed monitoring requirements but did not address the costs associated with modifications to the EBS system. Rather, the commenter believed that broker-dealers could reasonably modify their systems to capture execution time within the proposed six-month implementation period.[328] However, this same commenter noted that EBS requests using LTID as a query mechanism would take longer to implement than the proposed six month compliance date.[329] As discussed above, the Commission expects that it would, on occasion, request EBS data according to LTID.[330] In addition, the Commission notes that it is adopting a longer compliance date than it proposed—seven months after the Effective Date of the Rule. Because the Rule will be effective 60 days after publication in the **Federal Register**, this effectively results in a compliance date nine months after publication in the **Federal Register**.

The Commission understands that many broker-dealers will face different challenges in capturing and reporting execution time information, depending on the sophistication of and resources they have previously devoted to their recordkeeping systems. The Commission's estimate, however, is an average calculation that accommodates a broad spectrum of broker-dealer EBS systems, including the possibility that some firms might face larger burdens than the average since different firms would be affected to different degrees. Not all broker-dealers will face complexities involved with modifying non-integrated legacy systems to capture execution time, and some broker-dealers will not need to devote as many resources to those efforts as will others. The Commission's estimate is based on an aggregated figure that recognizes that different broker-dealers will need to invest different levels of resources based on the needs of their particular technology. Accordingly, the Commission believes that its initial 133,500 hour burden/year estimate for the one-time burden on registered broker-dealers to modify their existing EBS systems is reasonable and appropriate.[331] This figure assumes that, on average, each broker-dealer would have to devote 445 burden hours in order to develop, program, and test the

+ (Compliance Attorney at 10 hours) + (Compliance Clerk at 20 hours) + (Sr. Systems Analyst at 50 hours) + (Director of Compliance at 5 hours) + (Sr. Computer Operator at 35 hours) × (300 potential respondents) = 133,500 burden hours. As noted above, the Commission acknowledged that, in some instances, multiple LTIDs may be disclosed to a registered broker-dealer for a single account. Therefore, the hourly burden estimate factored in the cost that registered broker-dealers would need to develop systems capable of tracking multiple LTIDs. Rule 13f–1, like the Rule, requires monitoring of a certain threshold and, upon reaching that threshold, disclosure of information. As discussed *supra,* Rule 17a–25 requires broker-dealers to disclose information that is very similar in scope and character to the information required under the Rule.

[321] *See* SIFMA Letter at 14.

[322] *See id.*

[323] *See id.* at 5.

[324] *See id.* at 13.

[325] *See id.*

[326] *See id.* at 5.

[327] *See id.* at 6. The commenter states that one firm has estimated it would costs $4 to $5 million and take 18 to 24 months to expand OATS, whereas it would cost an estimated $3 to $4 million and take 12 to 18 months to build out the EBS system as proposed. The commenter did not provide any basis for these estimates nor what assumptions this firm made with regards to collection, reporting, and monitoring requirements, or other any other aspects of the Rule. The Commission's response to this comment in light of its estimate of the costs applicable to broker-dealers under the recordkeeping requirements of the Rule is discussed below in detail. *See supra* Section V.B.2.a (costs applicable to broker-dealers under the recordkeeping requirements of the Rule).

[328] *See* Financial Information Forum Letter at 7.

[329] *See id.*

[330] *See supra* Section III.B.2 (discussing reporting requirements).

[331] The Commission notes that its estimate is in line with the burden estimates from Rule 17a–25. *See* Rule 17a–25 Release, *supra* note 19, 66 FR at 35840–41.

enhancements to their existing systems to capture and report the additional fields of information (LTIDs and execution time).[332]

b. Reporting

In addition to requiring registered broker-dealers to maintain records of account transactions, the Rule also requires registered broker-dealers to report transaction data to the Commission upon request. In the Proposing Release, the Commission stated that this collection of information would not involve any substantive or material change in the burden that already exists as part of registered broker-dealers providing transaction information to the Commission in the normal course of business under the existing EBS system.[333] However, the Commission noted that the information would need to be available for reporting to the Commission on a next-day basis, versus the 10 business day period that typically is associated with an EBS request for data.[334] Nevertheless, the Commission believes that once the electronic recordkeeping system is in place to capture the information, and the system is designed and built to furnish the information within the time period specified in the Rule, the collection of information would result in minimal additional burden.

Although it is difficult to predict with certainty the Commission's future needs to obtain large trader data, the Commission estimated in the Proposing Release that, taking into account the Commission's likely need for data to be used for market reconstruction purposes and investigative matters, it would send 100 requests for large trader data per year to each affected registered broker-dealer.[335] The Commission estimated that it will take a registered broker-dealer 2 hours to comply with each request, considering that a broker-dealer would need to run the database query of its records, download the data file, and transmit it to the Commission.[336] The Commission received no comments on its reporting burden estimate and continues to believe that its initial estimate was reasonable. Accordingly, the Commission estimates the ongoing annual aggregate hour burden for broker-dealers to be 60,000 burden hours.[337]

c. Monitoring

In the Proposing Release, the Commission estimated that the one-time, initial burden for registered broker-dealers to comply with the monitoring requirements would be approximately 21,000 burden hours to establish a compliance system to detect and identify Unidentified Large Traders.[338] This figure was based on the estimated number of hours to establish policies and procedures reasonably designed to assure compliance with the identification requirements of the Rule. The Commission estimated that the ongoing annualized burden to broker-dealers for the monitoring requirements of the Rule, including the requirement on broker-dealers to inform Unidentified Large Traders of their potential obligations under Rule 13h–1, would be approximately 4,500 burden hours.[339]

As discussed above, one commenter believed that the Commission's estimate of 300 broker-dealers was underestimated and believed that the number of broker-dealers affected by the monitoring requirements might be closer to 1,500 because of steps the commenter believed clearing brokers would likely impose on others in order for them to comply with the monitoring safe harbor provision of Rule 13h–1(f), as proposed.[340] This commenter based its estimate on a belief that, though the Rule itself would not specifically require it, carrying broker-dealers might, in turn, require their introducing broker correspondents to establish policies and procedures to collect ''other reasonably available information'' on Unidentified Large Traders required by the proposed safe harbor to assist the clearing firms in complying with the requirements of the Rule that are applicable to them.[341] The commenter based its estimate on the fact that approximately 1,657 FINRA members have been assigned MPIDs as of June 2010. As such, this commenter believes that the Commission's ongoing burden estimate of 4,500 burden hours/year[342] (equivalent to $1,215,000/year[343]) should instead be something between 111,000 burden hours/year and 3,000,000 burden hours/year[344] (equivalent to $30,000,000–$750,000,000/year).[345] The commenter noted that its estimate included a full-time compliance professional.[346]

As discussed above, the safe harbor provision of Rule 13h–1(f), as adopted, makes clear the intended scope of ''other identifying information'' that a

[332] The Commission derived the total estimated burdens from the following estimates, which are based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f–1 and Rule 17a–25: (Computer Ops Dept. Mgr. at 30 hours) + (Sr. Database Administrator at 25 hours) + (Sr. Programmer at 150 hours) + (Programmer Analyst at 100 hours) + (Compliance Manager at 20 hours) + (Compliance Attorney at 10 hours) + (Compliance Clerk at 20 hours) + (Sr. Systems Analyst at 50 hours) + (Director of Compliance at 5 hours) + (Sr. Computer Operator at 35 hours) × (300 potential respondents) = 133,500 burden hours.

[333] *See* 17 CFR 240.17a–25.

[334] *See* Rule 17a–25 Release, *supra* note 19.

[335] Compared to the EBS system, where the Commission sent 5,168 electronic blue sheets requests between January 2007 and June 2009, the Commission expects to send fewer requests for large trader data, in particular because the Commission expects that a request for large trader data will be broader and encompass a larger universe of securities and a longer time period than would be the case for the typically more targeted EBS requests it currently sends.

[336] The Commission notes that the adopting release for Rule 17a–25 estimated that electronic response firms spend approximately 8 minutes and manual response firms spend 1.5 hours responding to an average blue sheet request. *See* Rule 17a–25 Release, *supra* note 19, at 35841. The Commission's 2-hour estimate for new Rule 13h–1 is intended to account for the collection and reporting of additional information on Unidentified Large Traders. This estimate also accommodates broker-dealers that might want to perform quality checks over the information before it is reported to the Commission.

[337] 100 × 300 × 2 = 60,000 burden hours. The Commission derived the total estimated burdens based on the Commission's experience with, and burden estimates for, other existing reporting systems, including Rule 17a–25. The Commission estimated that each broker-dealer who electronically responds to a request for data in connection with Rule 17a–25 and the EBS system spends 8 minutes per request. *See* Rule 17a–25 Release, *supra* note 19, 66 FR at 35841. Unlike EBS, under new Rule 13h–1, a broker-dealer will also be required to report data on Unidentified Large Traders. The Commission therefore believes that the time to comply with a request for data under the Rule could take longer than would a similar request for data under the EBS system, as a broker-dealer likely would take additional time to review and report information on any Unidentified Large Traders, including the additional fields of information specified in paragraph (d)(3) of the Rule, that they would be required to report to the Commission under the Rule.

[338] The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f–1: (Sr. Programmer at 10 hours) + (Compliance Manager at 10 hours) + (Compliance Attorney at 10 hours) + (Compliance Clerk at 20 hours) + (Sr. Systems Analyst at 10 hours) + (Director of Compliance at 2 hours) + (Sr. Computer Operator at 8 hours) × (300 potential respondents) = 21,000 burden hours. Rule 13f–1, like new Rule 13h–1, requires monitoring of a certain trading threshold.

[339] The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 13f–1 and Rule 17a–25: (Compliance Attorney at 15 hours) × (300 potential respondents) = 4,500 burden hours. Rule 13f–1, like new Rule 13h–1, requires monitoring of a certain threshold and, upon reaching that threshold, disclosure of information.

[340] *See* Financial Information Forum Letter at 6.

[341] *See id.*

[342] Compliance Attorney at 15 hours × 300 potential respondents = 4,500 burden hours

[343] Compliance Attorney at 15 hours × $270 per hour × 300 potential respondents = $1,215,000

[344] Compliance Attorney at 370 hours × 300 potential respondents = 111,000 burden hours; Compliance Attorney at 2,000 hours × 1,500 potential respondents = 3,000,000 burden hours.

[345] *See* Financial Information Forum Letter at 7.

[346] *See id.*

broker-dealer would need to consider, which is narrower in scope than what the commenter assumed. As adopted, the safe harbor policies and procedures would need to be reasonably designed to identify Unidentified Large Traders based on accounts at the broker-dealer. In assessing which accounts to consider, the Rule, as adopted, clarifies that the broker-dealer's policies and procedures should consider account name, tax identification number, or other identifying information ''available on the books and records of such broker-dealer.'' The policies and procedures would not need to consider information on the books and records of another broker-dealer. Accordingly, the Rule has been clarified to exclude a possible expansive interpretation of ''other readily available information'' that formed the basis for the commenter's concern.

Further, the Commission believes that large traders, whose aggregate NMS securities transactions by definition equal or exceed the identifying activity level, require sophisticated trade-processing capacities on the part of broker-dealers that service them. Consequently, the Commission believes it is unlikely that nearly all broker-dealers that have been assigned an MPID either carry accounts for or will effect a transaction on behalf of a large trader. Therefore, it does not expect all such entities to be impacted by the monitoring provisions of Rule 13h–1(f).[347] By providing additional guidance in the Rule, as adopted, the Commission believes it has clarified the intended monitoring responsibilities of broker-dealers and has shown that the burden estimates for these more limited requirements are in line with the Commission's original estimates.

d. Total Burden

Under the Rule, the total burden on these respondents will be 214,500 hours for the first year[348] and 64,500 hours for each subsequent year.[349]

E. Collection of Information is Mandatory

All collections of information pursuant to Rule 13h–1 will be mandatory.

F. Confidentiality

Section 13(h)(7) of the Exchange Act provides that Section 13(h) ''shall be considered a statute described in subsection (b)(3)(B) of [5 U.S.C. 552]'', which is part of the Freedom of Information Act (''FOIA'').[350] As such, ''the Commission shall not be compelled to disclose any information required to be kept or reported under [Section 13(h)].''[351] Accordingly, the information that a large trader will be required to disclose on Form 13H or provide in response to a Commission request will be exempt from disclosure under FOIA. In addition, any transaction information that a registered broker-dealer reports to the Commission under the Rule also will be exempt from disclosure under FOIA. The circumstances under which the Commission will provide information collected pursuant to Rule 13h–1 and Form 13H are discussed above.[352]

G. Record Retention Period

Registered broker-dealers will be required to retain records and information under Rule 13h–1 for a period of three years, the first two in an accessible place, in accordance with Rule 17a–4 under the Exchange Act.[353]

V. Consideration of Costs and Benefits

The Commission is sensitive to the costs and benefits that result from its rules. In the Proposing Release, the Commission identified certain costs and benefits of the Rule as proposed and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. The Commission received several comments relating to the cost-benefit analysis, which are discussed below. For the reasons discussed below, the Commission continues to believe that its estimates of the benefits and costs of Rule 13h–1, as set forth in the Proposing Release, are appropriate.

A. Benefits

U.S. securities markets have experienced a dynamic transformation in recent years. In large part, the changes reflect the culmination of a decades-long trend from a market structure with primarily manual trading to a market structure with primarily automated trading. Rapid technological advances have produced fundamental changes in the structure of the securities markets, the types of market participants, the trading strategies employed, and the array of products traded. The markets also have become even more competitive, with exchanges and other trading centers offering innovative order types, data products and other services, and aggressively competing for order flow by reducing transaction fees and increasing rebates. These changes have facilitated the ability of large institutional and other professional market participants to employ sophisticated trading methods to trade electronically in huge volumes with great speed. In addition, large traders have become increasingly prominent at a time when the markets are experiencing an increase in overall volume.[354]

Currently, to support its regulatory, investigative, and enforcement activities, the Commission collects transaction data through the EBS system.[355] The Commission uses the EBS system to obtain securities transaction information for two primary purposes: (1) To assist in the investigation of possible federal securities law violations, primarily involving insider trading or market manipulation; and (2) to conduct market reconstructions.

The EBS system has performed effectively as an enforcement tool for analyzing trading in a small sample of securities over a limited period of time. However, because the EBS system is designed for use in narrowly-focused enforcement investigations that generally involve trading in particular securities, it has proven to be insufficient for large-scale market reconstructions and analyses involving numerous stocks during peak trading volume periods. Importantly, EBS does not address the Commission's need to identify market participants in a uniform manner that would allow the Commission to readily aggregate their trading activity across broker-dealers, nor does it include time of execution information necessary to properly sequence and reconstruct trading activity.

[347] To the extent that a broker-dealer that is subject to the monitoring requirements requires, by contract or otherwise, an entity that is not otherwise subject to the Rule's monitoring requirements to nevertheless perform a monitoring function, the Commission's estimate does not account for that situation.

[348] This figure was derived from the estimated one-time burdens from the recordkeeping requirement (133,500 burden hours) + the reporting requirement (60,000 burden hours) + the monitoring requirement (21,000 burden hours) = 214,500 total burden hours.

[349] This figure was derived from the estimated ongoing burdens from the reporting requirement (60,000 burden hours) + the monitoring requirement (4,500 burden hours) = 64,500 total burden hours.

[350] 5 U.S.C. 552(b)(3)(B) is now 5 U.S.C. 552(b)(3)(A)(ii).

[351] *See* Section 13(h)(7) of the Exchange Act, 15 U.S.C. 78m(h)(7).

[352] *See supra* Section III.A.3.g.

[353] 17 CFR 240.17a–4.

[354] *See supra* note 8 (discussing analyst estimates of high frequency trader activity).

[355] *See* 17 CFR 240.17a–25 (Electronic Submission of Securities Transaction Information by Exchange Members, Brokers, and Dealers).

Following declines in the U.S. securities markets in October 1987 and October 1989, Congress noted that the Commission's ability to analyze the causes of a market crisis was impeded by its lack of authority to gather trading information.[356] To address this concern, Congress passed the Market Reform Act, which, among other things, amended Section 13 of the Exchange Act to add new subsection (h), authorizing the Commission to establish a large trader reporting system under such rules and regulations as the Commission may prescribe.[357]

The large trader reporting authority in Section 13(h) of the Exchange Act was intended to facilitate the Commission's ability to monitor the impact on the securities markets of securities transactions involving a substantial volume or large fair market value, as well as to assist the Commission's enforcement of the federal securities laws.[358] In particular, the Market Reform Act provided the Commission with the authority to collect broad-based information on large traders, including their trading activity, reconstructed in time sequence, in order to provide empirical data necessary for the Commission to perform investigations and conduct analysis of data.[359]

The large trader reporting system envisioned by the Market Reform Act authorizes the Commission to require large traders [360] to self-identify to the Commission and provide information to the Commission that identifies the trader.[361] The Market Reform Act also authorized the Commission to require large traders to identify their status as large traders to any registered broker-dealer through whom they directly or indirectly effect securities transactions.[362]

In addition to facilitating the ability of the Commission to identify large traders, the Market Reform Act also authorizes the Commission to collect information on the trading activity of large traders from broker-dealers. In particular, the Commission is authorized to require every registered broker-dealer to make and keep records with respect to securities transactions of large traders that equal or exceed a certain ''reporting activity level'' and report such transactions upon request of the Commission.[363]

To implement its authority under Section 13(h) of the Exchange Act, the Commission is adopting new Rule 13h–1 and Form 13H to establish large trader reporting requirements. The Rule is intended to assist the Commission in identifying traders that conduct a substantial volume or large fair market value of trading activity in the U.S. securities markets and obtain certain baseline information on their trading activity. Specifically, a ''large trader'' is defined as a person who effects transactions in NMS securities of at least, during any calendar day, two million shares or shares with a fair market value of $20 million or, during any calendar month, either 20 million shares or shares with a fair market value of $200 million.[364] The large trader reporting rule is designed to facilitate the Commission's ability to assess the impact on the securities markets of large trader activity and allow it to conduct trading reconstructions following periods of unusual market volatility and analyze significant market events for regulatory purposes.

The identification, recordkeeping, and reporting requirements will provide the Commission with a mechanism to identify large traders, as well as their affiliates, the broker-dealers they use, and their transactions. Specifically, Rule 13h–1 will require large traders to identify themselves to the Commission and make certain disclosures to the Commission on Form 13H. Upon receipt of Form 13H, the Commission will issue a unique identification number to the large trader, which the large trader will then provide to its registered broker-dealers. Registered broker-dealers will be required to maintain transaction records for each large trader customer and will be required to report that information to the Commission upon request. In addition, certain registered broker-dealers will need to adopt procedures to monitor their customers' activity for volume that triggers the identification requirements of the Rule.

In light of recent turbulent markets and the increasing sophistication and trading capacity of large traders, the Commission believes it needs to implement a large trader reporting rule to further enhance its ability to collect and analyze trading information, especially with respect to the most active market participants. In particular, the Commission believes it needs to implement a large trader reporting rule to reliably and efficiently identify large traders and promptly obtain information on their trading on a market-wide basis.

The Commission believes that the large trader reporting rule is necessary because, as noted above, large traders appear to be playing an increasingly prominent role in the securities markets.[365] Market observers have offered a wide range of estimates for the percent of overall volume attributable to one potential subcategory of large trader—high frequency traders—which is typically estimated at 50% of total volume or higher.[366] The large trader reporting rule is intended to provide a basic set of tools for the Commission to monitor more readily and efficiently the impact on the securities markets of large traders.

Among other things, the Commission believes that the large trader reporting rule will enhance its ability to: (1) Reliably identify large traders and their affiliates, (2) obtain more promptly trading data on the activity of large traders, including execution time, and (3) aggregate and analyze trading data among affiliated large traders. In addition to those benefits that the Commission believes will result from the large trader reporting rule, the Commission also expects that investors

[356] The legislative history accompanying the Market Reform Act also noted the Commission's limited ability to analyze the causes of the market declines of October 1987 and 1989. *See generally* Senate Report, *supra* note 14 and House Report, *supra* note 14.

[357] PL 101–432 (HR 3657), October 16, 1990.

[358] *See* 15 U.S.C. 78m(h)(1). *See also* Senate Report, *supra* note 14, at 42.

[359] *See* Senate Report, *supra* note 14 at 4, 44, and 71. In this respect, though SRO audit trails provide a time-sequenced report of broker-dealer transactions, those audit trails generally do not identify the broker-dealer's customers. Accordingly, the Commission is not presently able to utilize existing SRO audit trail data to accomplish the objectives of the Market Reform Act.

[360] Section 13(h) of the Exchange Act defines a ''large trader'' as ''every person who, for his own or an account for which he exercises investment discretion, effects transactions for the purchase or sale of any publicly traded security or securities by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of a national securities exchange, directly or indirectly by or through a registered broker or dealer in an aggregate amount equal to or in excess of the identifying activity level.'' *See* 15 U.S.C. 78m(h)(8)(A).

[361] *See* 15 U.S.C. 78m(h)(1)(A).

[362] *See* 15 U.S.C. 78m(h)(1)(B).

[363] *See* 15 U.S.C. 78m(h)(2). Section 13(h) also provides the Commission with authority to determine the manner in which transactions and accounts should be aggregated, including aggregation on the basis of common ownership or control. *See* 15 U.S.C. 78m(h)(3). The term ''reporting activity level'' is defined in Section 13(h)(8)(D) of the Exchange Act to mean ''transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule, regulation, or order, specifying the time interval during which such transactions shall be aggregated.'' *See* 15 U.S.C. 78m(h)(8)(D).

[364] This test is defined in the Rule as the ''identifying activity level.'' *See* new Rule 13h–1(a)(7). Section 13(h)(8)(c) of the Exchange Act, 15 U.S.C. 78m(h)(8)(c), authorizes the Commission to determine, by rule or regulation, the applicable identifying activity level.

[365] *See* 15 U.S.C. 78m(h)(1) and (h)(2) (reflecting the purpose of Section 13(h) of the Exchange Act to allow the Commission to monitor the impact of large traders).

[366] *See supra* note 8 (discussing analyst estimates of high frequency trader activity).

should likewise benefit as a consequence of the Commission's enhanced access to information to identify large traders and obtain prompt data on their activity that the Commission would be able to employ in carrying out its regulatory mission.

The Commission sought comment on the benefits associated with the proposed Rule. Many of the 87 comment letters, including those from retail investors, expressed support for the Rule's stated intent to obtain certain baseline trading information about traders that conduct a substantial volume or large fair market value of trading activity in the U.S. securities markets.[367]

One commenter, a large pension fund, stated that it believes that its beneficiaries will benefit from a greater understanding of today's hyper-electronic trading, which encompasses speed and volumes that were previously unknown to most participants.[368] Another commenter, a large mutual fund adviser, stated that the large trader reporting requirements are a pragmatic approach to obtain relevant data on trading activity in the U.S. securities markets and that recent volatility in the marketplace, as exemplified by the unprecedented events of May 6, 2010, has emphasized the need to provide improved regulatory access to trade data in order to detect manipulative trading activities and to analyze significant market events that negatively impact investor trust in the stock market.[369] In addition, a large broker-dealer commented that the EBS system is insufficient in today's trading environment for large scale investigations and market reconstructions across numerous securities during peak trading volume periods and agreed that regulators need additional levels of transparency into the trading practices of all firms with significant activity.[370]

B. Costs

1. Large Traders

In the Proposing Release, the Commission identified the primary costs to large traders from the proposal as the requirement to self-identify to the Commission, including using existing systems to detect when they meet the identifying activity level, filing Form 13H when large trader status is achieved, and informing its broker-dealers of its LTID and all accounts to which it applies. The Commission is adopting the identification requirements substantially as proposed. However, the Commission has not adopted Form 13H as proposed. Specifically, the Commission did not adopt the proposed requirement that large traders report brokerage account numbers. Instead, the Rule as adopted requires that large traders report a list of broker-dealers with whom they have an account. As a consequence, large traders will not have to report on Form 13H the LTID of any other large traders with whom they collectively exercise investment discretion, and so will not have to disclose their LTID to other traders or collect from other large traders the LTID of such traders.

The Rule will require large traders to file Form 13H with the Commission promptly after first effecting transactions that reach the identifying activity level.[371] Further, when determining who should register with the Commission as a ''large trader'' by filing Form 13H, the Rule is intended to focus, in more complex organizations, on the parent company of the entities that exercise investment discretion. The purpose of this focus is to narrow the number of persons that will self-identify as ''large traders'' and file Form 13H, while allowing the Commission to identify the primary institutions that conduct a large trading business. Focusing the identification requirements in this manner is intended to enable the Commission to easily identify and readily contact the principal groups that control large traders, while minimizing the costs associated with filing and self-identification that will be imposed on large traders. Large traders will, however, be able to assign and attach a suffix to the LTID that is assigned to them by the Commission.

To limit the impact of the Rule on entities whose trading is not characterized by the exercise of investment discretion that the Commission intends to capture under the definition of ''large trader,'' the Rule provides several exceptions from the definition of ''transaction'' that are considered when determining large trader status. These exceptions are intended to balance the Commission's desire to capture significant trading activity with the cost imposed on market participants to register and report as large traders. These exceptions include any transaction that constitutes a gift, any transaction effected by a court-appointed executor, administrator, or fiduciary pursuant to the distribution of a decedent's estate, any transaction effected pursuant to a court order or judgment, and any transaction effected pursuant to a rollover of qualified plan or trust assets subject to Section 402(c)(1) of the Internal Revenue Code.[372] As discussed above, in response to comments, the Commission is adopting as exceptions, in addition to those proposed, several types of transactions that focus on corporate actions that are not characteristic of an arm's-length purchase or sale of securities in the secondary market that would normally be characteristic of a ''trader'' in securities, such as business combinations, issuer tender offers, and buybacks, as well as stock loans and equity repurchases. The Commission believes that these additional categories of transactions are effected for materially different reasons than those commonly associated with the arm's-length trading of securities in the secondary market and the associated exercise of investment discretion. For example, transactions involving business combinations, as well as issuer stock buybacks and issuer tender offers, reflect fundamental corporate decision-making. They are not effected with an intent or expectation to profit from the trade itself, but are transactions conducted by or with issuers of securities in furtherance of corporate objectives involving publicly-traded securities. Further, stock loan and equity repos typically are entered into as part of a larger financing transaction or for purposes of generating corporate income and, as such, are effected with general corporate intent rather than for purposes of buying or selling positions in securities. Accordingly, the Commission believes it appropriate to not count these transactions for the purpose of determining whether a person meets the identifying activity threshold contained in the definition of large trader. The Commission believes that adding these additional exclusions will further reduce the potential cost of the Rule on affected entities, as well as registered broker-dealers, while at the same time allowing the Commission to focus the Rule on those entities and activities that the Commission seeks to identify under the Rule.

In addition, the Rule provides for an Inactive Status to further reduce the

[367] *See, e.g.* GETCO Letter; CalSTRS Letter; David L. Goret Letter; Prudential Letter; Investment Adviser Association Letter; American Benefits Council Letter; Howard Hughes Medical Institute Letter; T. Rowe Price Letter; Financial Engines Letter; Investment Company Institute Letter; Wellington Management Letter; SIFMA Letter; and Foothill Securities Letter.

[368] *See* CalSTRS Letter at 1. The commenter noted that it would be ''pleased to be subject to the rule.'' *Id.*

[369] *See* T. Rowe Price Letter at 1.

[370] *See* GETCO Letter at 2.

[371] *See* new Rule 13h–1(b)(1)(i).

[372] *See* new Rule 13h–1(a)(6).

potential costs of the Rule for infrequent traders who may trip the threshold on a particular occasion but do not otherwise trade at sufficient levels to merit continued status as a large trader or that warrant imposing the regulatory burdens of the Rule. In particular, large traders that have not effected aggregate transactions at any time during the previous full calendar year that are equal to or greater than the identifying activity level will be eligible for Inactive Status upon checking a box on the cover page of their next annual Form 13H filing.[373] Specifically, Inactive Status will relieve a person from the requirement to file amended Forms 13H.

Form 13H also allows a large trader to report the termination of its operations (*i.e.,* Inactive Status where the entity, because it has discontinued operations, has no potential to requalify for large trader status in the future). This designation is intended to allow large traders to inform the Commission of their status and to signal to the Commission not to expect future Form 13H filings from the large trader. For example, termination status will be relevant in the case of a merger or acquisition where the large trader does not survive the corporate transaction. In addition, with respect to registered broker-dealers, the Termination Filing is intended to reduce the potential costs to registered broker-dealers who will no longer have to track the entity's LTID.

In the Proposing Release, the Commission noted that from time to time, information provided by large traders through their Forms 13H may become inaccurate. Rather than requiring prompt updates whenever this occurs, the Rule instead will require ''Amended Filings'' on a quarterly basis (and only when the prior submission becomes inaccurate). Specifically, large traders will be required to amend their latest Form 13H by submitting an ''Amended Filing'' promptly following the end of a calendar quarter in the event that any of the information contained in a Form 13H filing becomes inaccurate for any reason (*e.g.,* change of name or address, type of organization, regulatory status, broker-dealers used, or affiliates).[374] Regardless of whether any quarterly amended Form 13Hs are filed, large traders are required to file Form 13H annually (an ''Annual Filing''), within 45 days after the calendar year-end, in order to ensure the accuracy of all of the information reported to the Commission.[375] The quarterly filing requirement for amendments is designed to mitigate the filing burden on large traders, as large traders will not be required to file a large number of amendments on a more prompt basis every time something in their latest Form 13H needs to be corrected or updated. A large trader could elect to file more promptly or frequently at its discretion, but would not be required to do so.

In the Proposing Release, the Commission estimated that the aggregate costs for the estimated 400 respondents that would register on Form 13H and obtain from the Commission an LTID and inform its broker-dealers of its LTID and the accounts to which it applies would be $1,317,600.[376] The Commission stated its belief that potential large trader respondents would not need to modify their existing systems to comply with proposed Rule 13h–1. Rather, the Commission believed that large traders already maintain systems that are capable of computing their level of trading, and the Commission expected that firms would be able to use their existing systems to assess whether they have reached the identifying activity level. Further, as discussed above, the Rule as adopted allows a large trader to voluntarily register with the Commission, even before it meets the applicable trading activity threshold, in order to eliminate the need for a person to actively monitor its trading levels for purposes of Rule 13h–1. To the extent a large trader does not want to track its trading levels for the identifying activity level thresholds, it can avail itself of the option to voluntarily register and forego the burden of such tracking. Any person that elects to voluntarily file would be treated as a large trader for purposes of the Rule, and would be subject to all of the obligations of a large trader under the Rule, notwithstanding the fact that the person had not effected the requisite level of transactions at the time it registered as a large trader.

In addition, the Commission estimated in the Proposing Release that the aggregate cost to file amendments as well as an annual updated Form 13H would be $998,400.[377] The Commission did not expect these costs per large trader of self-identification and reporting to the Commission to have any significant effect on how large traders conduct business because such costs would be marginal when compared to level of activity at which a large trader would be trading, and should not change how such traders conduct business, create a barrier to entry, or otherwise alter the competitive landscape among large traders. Further, the Commission is designing an electronic filing system for Form 13H that is intended to minimize the costs associated with filing Form 13H, for example, by allowing filers to access and amend their most recently filed Form 13H when filing an amended or annual update.

As noted in the PRA section above, several commenters believed that the Commission underestimated the costs of the proposed rule on large traders.[378] These commenters principally noted that the proposal's requirements to gather and report information related to account numbers and names, affiliates, and bank and insurance regulators would be burdensome.[379] Commenters noted that the Commission assumed that this information was readily available for all large traders.[380]

As discussed above, the Commission, in adopting the Rule, modified Form 13H from the proposed version to reduce the potential costs associated with filing Form 13H for affected entities. Most significantly, the Commission did not adopt the proposed requirement that large traders report their broker-dealer account numbers on Form 13H. Instead, large traders will be required to report a list of broker-dealers with whom they or their Securities

[373] *See* new Rule 13h–1(b)(3)(iii).

[374] *See* new Rule 13h–1(b)(1)(iii).

[375] *See* new Rule 13h–1(b)(1)(ii).

[376] The Commission derived the total estimated cost from the following estimates, which were based on the Commission's experience with, and cost estimates for, other existing reporting systems including Rule 13f–1: ((Compliance Manager (3 hours) at $258 per hour) + (Compliance Attorney (7 hours) at $270 per hour) + (Compliance Clerk (10 hours) at $63 per hour)) × (400 potential respondents) = $1,317,600. Rule 13f–1, like new Rule 13h–1, requires the filing of a form (Form 13F) upon exceeding a certain trading threshold. Hourly figures were from SIFMA's Management & Professional Earnings in the Securities Industry 2008 and SIFMA's Office Salaries in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 or 2.93, as appropriate, to account for bonuses, firm size, employee benefits, and overhead.

[377] The Commission derived the total estimated burdens from the following estimates, which were based on the Commission's experience with, and burden estimates for, other existing reporting systems including Rule 6a–2: ((Compliance Manager (2 hours) at $258 per hour) + (Compliance Attorney (5 hours) at $270 per hour) + (Compliance Clerk (10 hours) at $63 per hour)) × (400 potential respondents) = $998,400. Rule 6a–2, like new Rule 13h–1, requires: (1) Form amendments when there are any material changes to the information provided in the previous submission; and (2) submission of periodic updates of certain information provided in the initial Form 1, whether or not such information has changed.

[378] *See, e.g.,* Prudential Letter; Investment Adviser Association Letter; and Investment Company Institute Letter.

[379] *See, e.g.,* American Bankers Association Letter.

[380] *See, e.g.,* Investment Company Institute Letter.

Affiliates have an account. In light of these modifications from the proposal, the Commission continues to believe that its estimate of initial and ongoing costs is appropriate. The initial cost estimate was based on the understanding that large traders know and can readily identify their brokerage account numbers. As noted by commenters, particularly investment advisers, this may not be the case for all large traders, at least not in a form that would be conducive to reporting on Form 13H. One commenter recommended an alternative approach to requiring large traders to disclose a list of the broker-dealers that the large trader is authorized to use.[381] This commenter noted that many investment advisers maintain an approved list of broker-dealers and have processes for adding and deleting broker-dealers as well as reviewing trades with a broker-dealer not on the approved list.[382] The Commission has considered this alternative, and believes it is appropriate to focus the reporting burden on a list of broker-dealers at which the large trader maintains an account, rather than a list of accounts held at those broker-dealers. The Commission believes, based on the comments it received from investment advisers on this topic, that this new requirement will reduce the potential costs for certain large traders, particularly investment advisers.

The adopted Rule also limits the scope of information that must be reported on bank and insurance regulators and focuses the identification requirement on affiliates that trade, rather than merely beneficially own, NMS securities. However, the Commission does not anticipate that these changes from the proposal will materially affect the Commission's initial cost estimates. In particular, the prominence and scope of those items on the Form, relative to the other disclosure requirements, were minor and the fact that they were not adopted should not materially affect the cost estimates. Further, the Form, as adopted, now includes additional items such as the requirement to provide an organizational chart and to identify any affiliates that file separately and any affiliates that have been assigned an LTID suffix. The Commission carefully considered the changes to the Form in light of the comments received on the Form and the initial cost estimates, and believes that the removal of certain required information balances the addition of new requirement information of a similar scope so as to not affect the overall reporting burdens. Accordingly, the balanced modifications to the Rule and additional guidance on the intended scope of the Rule result in changes that are in line with the Commission's original estimates.

2. *Registered Broker-Dealers*

The Commission anticipated that the three primary costs to registered broker-dealers from the proposal were: (1) Recordkeeping requirements; (2) reporting requirements; and (3) monitoring requirements.

a. Recordkeeping

The Rule will require registered broker-dealers to keep records of transactions for large traders and Unidentified Large Traders.[383] The Rule also will require brokers and dealers to furnish transaction records of large traders and Unidentified Large Traders to the Commission upon request. While most of the data required to be kept pursuant to Rule 13h–1 is already required under Rule 17a–25 and reported via the EBS system, the large trader reporting rule will contain two additional fields of information, notably the LTID number(s) and execution time of the transaction. The Rule will require records to be kept for a period of three years, the first two in an accessible place, in accordance with Rule 17a–4(b) under the Exchange Act.[384]

In the Proposing Release, the Commission estimated that the one-time, initial costs for each registered broker-dealer for development of enhancements to its EBS infrastructure, including re-programming and testing of the systems, would be approximately $106,060.[385] The Commission also believed that there would be minimal additional costs associated with the operation and maintenance of the large trader reporting rule because it would utilize the existing EBS system. Accordingly, the Commission estimated the total start-up, operating, and maintenance cost burden for registered broker-dealers to be $31,818,000.[386] As previously noted, this figure was based on the estimated number of hours for development and implementation of enhancements to the firm's EBS systems, including software development, taking into account the fact that two new data elements were required to be captured and that data would be required to be available for reporting to the Commission on the morning following the day on which the transactions were effected. Because broker-dealers already capture most of the data required to be captured under Rule 13h–1 pursuant to Rule 17a–25, the Commission did not expect broker-dealers to have to incur any additional hardware costs.

In response to the Commission's recordkeeping burden estimates, as previously discussed in the PRA section above, one commenter stated that one of its member firms estimated it would cost $3,000,000–$4,000,000 to build out its EBS system in a manner required by the proposed rule, though the commenter did not provide any basis for the estimate or assumptions that were made with regards to the collection, reporting, and monitoring requirements of the Rule.[387] This figure, which is an estimate of one affected entity that represents a single data point, is significantly higher than the Commission's estimate of $106,060 for the initial one-time costs of implementing the system changes required by the Rule as adopted. The commenter noted that one potential major cost of implementing the recordkeeping requirement is that some broker-dealers do not have access to execution times in a manner that is readily reportable under the EBS infrastructure.[388] These broker-dealers, the commenter stated, would need to devote considerable resources to updating EBS to gather, process, and transmit such information.[389]

The Commission notes that commenters did not express particular concern with the proposed requirement to record and report LTIDs, but rather focused on the transmission of execution time from the execution-facing systems to the clearing-facing systems which traditionally are utilized in the EBS process. The Commission

[381] *See* Wellington Management Letter at 4 and Investment Company Institute Letter at 8–9.

[382] *See* Investment Company Institute Letter at 9.

[383] *See* new Rule 13h–1(a)(9) (defining ''Unidentified Large Trader'').

[384] 17 CFR 240.17a–4.

[385] The Commission derived the total estimated one-time cost from the following: (Computer Ops Dept. Mgr. (30 hours) at $335 per hour) + (Sr. Database Administrator (25 hours) at $281 per hour) + (Sr. Programmer (150 hours) at $292 per hour) + (Programmer Analyst (100 hours) at $193 per hour) + (Compliance Manager (20 hours) at $258 per hour) + (Compliance Attorney (10 hours) at $270 per hour) + (Compliance Clerk (20 hours) at $63 per hour) + (Sr. Systems Analyst (50 hours) at $244 per hour) + (Director of Compliance (5 hours) at $388 per hour) + (Sr. Computer Operator (35 hours) at $75 per hour) = $106,060. As noted above, the Commission acknowledged that, in some instances, multiple LTIDs may be disclosed to a registered broker-dealer for a single account. Therefore, the cost estimate factored in the cost that registered broker-dealers would need to develop systems capable of tracking multiple LTIDs.

[386] 300 affected broker-dealers × $106,060 = $31,818,000.

[387] *See* SIFMA Letter at 6.

[388] *See id.* at 13.

[389] *See id.*

understands that broker-dealers will face different challenges in capturing and reporting execution time information, depending on the sophistication of and resources they have previously devoted to their recordkeeping systems. Relevant factors might include, for example, the size of the entity, the nature, flexibility, and extent of their existing systems, and the business and other regulatory drivers for their technological strategies. As such, the Commission's estimate involves an average calculation that accommodates a broad spectrum of broker-dealer EBS systems and considers that different firms would be affected to different degrees, including the possibility that some firms might spend more than the average. However, not all broker-dealers will face complexities involved with modifying non-integrated legacy systems to capture execution time, and some broker-dealers will not need to devote as many resources to those efforts as will others. For example, one commenter that represents a group that focuses on technological aspects of securities regulation expressed concern with the proposed monitoring requirements but did not address the costs associated with modifications to the EBS system. Rather, the commenter believed that broker-dealers could reasonably modify their systems to capture execution time within the proposed six-month implementation period.[390] The Commission's estimate is based on an aggregated figure that recognizes that different broker-dealers will need to invest different levels of resources based on the needs of their particular technology.

b. Reporting

The Rule will require registered broker-dealers to report transactions that equal or exceed the reporting activity level effected by or through such broker-dealer for both identified and Unidentified Large Traders. More specifically, upon the request of the Commission, registered broker-dealers will be required to report electronically, in machine-readable form and in accordance with instructions issued by the Commission, all information required under paragraphs (d)(2) and (d)(3) of the Rule for all transactions effected directly or indirectly by or through accounts carried by such broker-dealer for large traders and other persons for whom records must be maintained, which equal or exceed the reporting activity level. These broker-dealers will need to report a particular day's trading activity only if it equals or exceeds the ''reporting activity level'' but will be permitted to report all data without regard to that threshold.

In the Proposing Release, the Commission estimated that the costs of the proposed reporting requirements would be $16,200,000.[391] The Commission's estimate took into account the design and intent of the proposed rule to utilize the recordkeeping and reporting infrastructure of the existing EBS system. The Commission received no comments on its reporting cost estimate and continues to believe that its initial estimate is appropriate.

c. Monitoring

As proposed, paragraph (f) of Rule 13h–1 would establish a ''safe harbor'' for the duty to monitor for Unidentified Large Traders.[392] Specifically, for purposes of determining under the Rule whether a registered broker-dealer has reason to know that a person is a large trader, a registered broker-dealer generally need take into account only transactions in NMS securities effected by or through such broker-dealer.[393] A registered broker-dealer would be deemed not to know or to have reason to know that a person is a large trader if: (1) It does not have actual knowledge that a person is a large trader;[394] and (2) it established and maintained policies and procedures reasonably designed to assure compliance with the identification requirements. Proposed paragraphs (f)(1) and (2) of the rule provided the specific elements that will be required for the safe harbor, including policies and procedures reasonably designed to inform persons of their obligations to file Form 13H and disclose their large trader status.

As discussed above, a few commenters asked for clarification of the monitoring requirements and offered alternatives.[395] Of those commenters that addressed the issue, most were critical of the proposed monitoring requirements.[396] The Commission believes the concerns expressed by commenters are a result of confusion as to the nature of the contemplated monitoring requirements. As noted in the Proposing Release, the Rule places ''the principal burden of compliance with the identification requirements on large traders themselves.''[397] Further, the Commission characterized broker-dealers' monitoring requirements as ''limited'' and ''a necessary backstop to encourage compliance and fulfill the objectives of Section 13(h) of the Exchange Act.''[398] The safe harbor in Rule 13h–1(f) references reasonably designed systems to detect and identify persons that may be large traders—based upon transactions effected through an account or group of accounts or other information readily available to the broker-dealer. Further, the safe harbor references reasonably designed systems to inform such persons of their potential obligations under Rule 13h–1. The broker-dealer monitoring requirements are intended to promote awareness of and foster compliance with Rule 13h–1.

The Commission notes that a large trader is required to assess *for itself* whether it meets the identifying activity threshold and thus qualifies as a large trader. To this extent, the Commission notes that there are certain exclusions, for example from the types of transactions that are counted towards the identifying activity threshold, that may have excused a customer from having to register as a large trader even though its aggregate transactions exceed the applicable identifying activity threshold. Unless a broker-dealer has actual knowledge to the contrary that a customer is a large trader (*e.g.,* the customer voluntarily informs the broker-dealer that it is a large trader under Rule 13h–1), the monitoring requirements contemplate an inquiry by the broker-dealer into whether a customer meets the identifying activity threshold based upon transactions effected through an account or a group of accounts at that broker-dealer.

In the Proposing Release, the Commission estimated the initial, one-time cost to establish policies and

[390] *See* Financial Information Forum Letter at 7.

[391] The Commission derived the total estimated ongoing cost from the following: (Compliance Attorney (2 hours) at $270 per hour) × (100 requests per year) × (300 potential respondents) = $16,200,000.

[392] *See* new Rule 13h–1(a)(9) (defining an Unidentified Large Trader as ''each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this rule that a registered broker-dealer knows or has reason to know is a large trader.'')

[393] *See* new Rule 13h–1(a)(9).

[394] As discussed above, if a registered broker-dealer has actual knowledge that a person is a large trader, then the broker-dealer would treat such person as an Unidentified Large Trader under the Rule.

[395] *See, e.g.,* Financial Information Forum Letter; SIFMA Letter; and GETCO Letter.

[396] One commenter described the proposed safe harbor as ''anything but safe'' and, as discussed above, asserted that the proposal exceeds the Commission's statutory authority because, among other reasons, the safe harbor provided that a registered broker-dealer would have reason to know that a customer is an Unidentified Large Trader based on other readily available information, as well as transactions effected through the broker-dealer. *See* SIFMA Letter at 11.

[397] Proposing Release, *supra* note 3, 75 FR at 21470.

[398] *Id.*

procedures pursuant to the proposed safe harbor provision would be $3,982,800.[399] The Commission estimated that the ongoing cost would be $1,215,000.[400] The Commission believed that the proposed safe harbor would reduce the costs associated with the monitoring requirements of the proposed rule on registered broker-dealers. Among other things, it would limit the broker-dealer's obligations to only those Unidentified Large Traders that should be readily identifiable and apparent to the broker-dealer and would require the broker-dealer to inform such persons of their obligations to file proposed Form 13H and disclose their large trader status to the Commission.

As noted above in the PRA section, one commenter stated that the Commission's broker-dealer estimate of 300 broker-dealers was underestimated. This commenter believed that the number of broker-dealers affected by the monitoring requirements might be closer to 1,500 to the extent that carrying broker-dealers require their introducing broker correspondents to establish policies and procedures under the safe harbor to collect the information on Unidentified Large Traders required by the Rule to help the clearing firm comply with the requirements of the Rule that are applicable to them.[401] The commenter based its estimate on the fact that approximately 1,657 FINRA members have been assigned MPIDs as of June 2010.[402] As such, this commenter argued that the Commission's ongoing burden estimate of 4,500 burden hours/year[403] (equivalent to $1,215,000/year[404]) should really be 111,000 burden hours/year–3,000,000 burden hours/year[405] (equivalent to about $30,000,000–$750,000,000/year).

As discussed above, the commenter based its analysis on the safe harbor provisions of the proposed rule and was concerned with the reference to ''other readily available information'' contained in the proposed safe harbor. The commenter's estimate was based on a belief that, though the Rule itself would not specifically require it, carrying broker-dealers might, in turn, require their introducing broker correspondents to establish policies and procedures to collect information on Unidentified Large Traders required by the Rule to assist the clearing firms in complying with the requirements of the Rule that are applicable to them.[406] As adopted, however, the safe harbor provision of the Rule makes clear the intended scope of ''other identifying information'' that a broker-dealer would need to consider, which is narrower than what the commenter assumed. As adopted, the safe harbor policies and procedures would need to be reasonably designed to identify Unidentified Large Traders based on accounts at the broker-dealer. In assessing which accounts to consider, the Rule, as adopted, clarifies that the broker-dealer's policies and procedures should consider account name, tax identification number, or other identifying information ''available on the books and records of such broker-dealer.'' As discussed above, the safe harbor policies and procedures would not need to take into account information on the books and records of another broker-dealer. Accordingly, the scope of the provision cited by the commenter is not as extensive as the commenter thought might be intended, and the revised Rule text has now clarified the intended scope.

Further, also as described with respect to the PRA, the Commission believes that large traders, whose aggregate NMS securities transactions equal or exceed the identifying activity level, require sophisticated trade-processing capacities.[407] The Commission believes it is unlikely that all broker-dealers that have been assigned an MPID would likely either carry accounts for or effect transactions on behalf of a large trader. Accordingly, all such entities are not expected to be impacted by the monitoring provisions of Rule 13h–1(f), and the Commission continues to believe that its initial estimate of 300 affected broker-dealers is appropriate.[408]

VI. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required 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 would promote efficiency, competition, and capital formation.[409] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[410] Exchange Act Section 23(a)(2) 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.

The Commission is adopting Rule 13h–1 pursuant to its authority under Sections 13(h) and 23(a) of the Exchange Act. Section 13(h)(2) requires the Commission, when engaging in rulemaking pursuant to that authority that would require every registered broker-dealer to make and keep for prescribed periods such records as the Commission by rule or regulation prescribes, to consider whether such rule is ''necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act].''[411]

In the Proposing Release, the Commission requested comment on whether proposed Rule 13h–1 would place a burden on competition, as well as the effect of the proposal on efficiency, competition, and capital formation. While the Commission did receive comment letters that discussed the overall number of respondents that would be affected by the proposed rule,[412] as well as the Commission's cost and burden estimates,[413] the Commission only received one comment that specifically addressed whether Rule 13h–1 would burden

[399] The Commission derived the total estimated one-time cost from the following: ((Sr. Programmer (10 hours) at $292 per hour) + (Compliance Manager (10 hours) at $258 per hour) + (Compliance Attorney (10 hours) at $270 per hour) + (Compliance Clerk (20 hours) at $63 per hour) + (Sr. Systems Analyst (10 hours) at $244 per hour) + (Director of Compliance (2 hours) at $388 per hour) + (Sr. Computer Operator (8 hours) at $75 per hour)) × (300 potential respondents) = $3,982,800.

[400] The Commission derived the total estimated ongoing cost from the following: (Compliance Attorney at (15 hours) × $270 per hour) × (300 potential respondents) = $1,215,000.

[401] *See* Financial Information Forum Letter at 6.

[402] *See id.*

[403] Compliance Attorney at 15 hours × 300 potential respondents = 4,500 burden hours.

[404] Compliance Attorney at 15 hours at $270 per hour × 300 potential respondents = $1,215,000.

[405] Compliance Attorney at 370 hours × 300 potential respondents = 111,000 burden hours; Compliance Attorney at 2,000 hours × 1,500 potential respondents = 3,000,000 burden hours.

[406] *See* Financial Information Forum Letter at 6.

[407] *See supra* text accompanying note 281 (noting one commenter, a large investment management firm and likely large trader, that reported that it currently has approximately 250 broker-dealers on its approved list for executing equity transactions).

[408] To the extent that a broker-dealer that is subject to the monitoring requirements requires, by contract or otherwise, an entity that is not otherwise subject to the Rule's monitoring requirements to nevertheless perform a monitoring function, the Commission's estimate does not account for that situation.

[409] 15 U.S.C. 78c(f).

[410] 15 U.S.C. 78w(a)(2).

[411] The Commission is adopting new Rule 13h–1(b) relating to identification requirements for large traders pursuant to Section 13(h)(1) of the Exchange Act, which does not require the Commission to consider the factors identified in Section 3(f), 15 U.S.C. 78c(f). Analysis of the effects, including the considerations under Section 23(a), of new Rule 13h–1(b) is discussed above in Sections IV and V.

[412] *See supra* Section IV.C.

[413] *See supra* Sections IV.D and V.B.

competition or impact efficiency, competition, and capital formation.[414] The comment is addressed as part of the discussion below.

A. Competition

In the Proposing Release, the Commission considered the impact of proposed new Rule 13h–1 on the securities markets and market participants. Information provided by market participants and broker-dealers in their registrations and filings with us informs our views on the structure of the markets in which they participate. We begin our consideration of potential competitive impacts with observations of the current structure of these markets.

The securities trading industry is a competitive one with reasonably low barriers to entry. The intensity of competition across trading platforms in this industry has increased in the past decade as a result of a number of factors, including market reforms and technological advances. This increase in competition has resulted in decreases in market concentration, more competition among trading centers, a proliferation of trading platforms competing for order flow, and decreases in trading fees.

The reasonably low barriers to entry for trading centers are evidenced, in part, by the fact that new entities, primarily ATSs, continue to enter the market.[415] For example, there are approximately 40 registered ATSs that trade NMS securities. In addition, the Commission within the past few years has approved applications by two entities—BATS Exchange, Inc. and NASDAQ Stock Market LLC—to become registered as national securities exchanges for trading equities, and approved proposed rule changes by two existing exchanges—International Securities Exchange, LLC (''ISE'') and Chicago Board Options Exchange, Incorporated—to add equity trading facilities to their existing options business.[416] Moreover, on March 12, 2010, Direct Edge received approval from the Commission for its trading platforms to operate as facilities of two newly created national securities exchanges.[417] We believe that competition among trading centers has been facilitated by Rule 611 of Regulation NMS,[418] which encourages quote-based competition between trading centers; Rule 605 of Regulation NMS,[419] which empowers investors and broker-dealers to compare execution quality statistics across trading centers; and Rule 606 of Regulation NMS,[420] which enables customers to monitor their broker-dealers' order routing practices.

Broker-dealers are required to register with the Commission and at least one SRO. The broker-dealer industry, including market makers, is a competitive industry with most trading activity concentrated among several larger participants and thousands of smaller participants competing for niche or regional segments of the market. There are approximately 5,035 registered broker-dealers, of which approximately 862 are small broker-dealers.[421]

Larger broker-dealers often enjoy economies of scale over smaller broker-dealers and compete with each other to service the smaller broker-dealers, who are both their competitors and their customers.

As discussed above, the Commission acknowledges that the Rule will entail costs. In particular, requiring registered broker-dealers to establish recordkeeping systems to capture the required information, in particular the new fields that are not currently captured under the existing EBS system, will require one-time initial expenses, as discussed above. In addition, registered broker-dealers will need to implement policies and procedures to monitor their customers' trading in order to determine whether customers' trades would trigger the threshold for large trader status. The Commission does not believe that these expenses would adversely affect competition.

In our judgment, the costs of complying with Rule 13h–1 would not be so large as to significantly raise barriers to entry, or otherwise alter the competitive landscape of the industries involved because the incremental costs of Rule 13h–1 that would be incurred by broker-dealers would be marginal relative to the costs of complying with the existing EBS system.[422] In industries characterized by reasonably low barriers to entry and competition, the viability of some of the less successful competitors may be sensitive to regulatory costs. Nonetheless, we believe that the broker-dealer industry would remain competitive, despite the costs associated with implementing new Rule 13h–1, even if those costs influence the entry or exit decisions of individual broker-dealer firms at the margin.

The Commission does not expect that the costs associated with new Rule 13h–1, which are marginal relative to the costs of complying with the existing EBS system, would be a determining factor in a broker-dealer's entry or exit decision or decision to accept large trader customers because the volume of trading associated with large traders and resultant revenue that could be gained by servicing a large trader would justify the costs associated with the Rule.

Further, the Commission would not be compelled to disclose publicly any information required to be kept or reported under Section 13(h) of the Exchange Act, including information kept or reported pursuant to Rule 13h–1.[423] Information and trading data that the Commission would obtain pursuant to the Rule would not be shared with others and would not be available to other large traders or broker-dealers. Accordingly, because the large trader transaction data will be reported only to the Commission, and not made publicly available for use by a large trader's customers or competitors, the Commission expects the Rule to have little to no impact on competition.

The approach of new Rule 13h–1 will advance the purposes of the Exchange Act in a number of significant ways. The Commission believes that the large trader reporting rule will enhance its ability to identify large traders and collect trading data on their activity at a time when, for example, many such traders employ rapid algorithmic systems that quote and trade in huge volumes. The large trader reporting rule will provide a useful source of data to facilitate the ability of the Commission to monitor and analyze more readily and efficiently the impact of large traders, including high-frequency traders, on the securities markets. Although, as noted above, several commenters stated that the Commission underestimated the costs of the proposed rule,[424] the Commission has made several modifications to the Rule to reduce reporting burdens. The Commission believes that establishing the large trader reporting rule would not

[414] *See* European Banking Federation and Swiss Bankers Association Letter.

[415] *See* Securities Exchange Act Release No. 60997 (Nov. 13, 2009), 74 FR 61208, 61234 (Nov. 23, 2009) (discussing the reasonably low barriers to entry for ATSs and that these reasonably low barriers to entry have generally helped to promote competition and efficiency).

[416] The ISE discontinued its equities platform in 2010. *See* Press Release, Direct Edge, *available at http://www.directedge.com/DE_ISE_Partner.aspx*.

[417] *See* Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010).

[418] 17 CFR 242.611.

[419] 17 CFR 242.605.

[420] 17 CFR 242.606.

[421] These numbers are based on a review of 2009 FOCUS Report filings reflecting registered broker-dealers, and discussions with SRO staff. These numbers do not include broker-dealers that are delinquent on FOCUS Report filings.

[422] *See supra* Sections IV (Paperwork Reduction Act) and V (Consideration of Costs and Benefits) for a detailed description of the expected costs.

[423] *See supra* Section III.A.3.g.

[424] *See supra* Section V.B.

impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In particular, the Commission believes that the Rule will implement the Commission's authority under Section 13(h) of the Exchange Act at a crucial time when large traders play an increasingly prominent role in the securities markets.

While one commenter raised the possibility that a U.S. large trader reporting rule may incentivize non-U.S. traders to shift their trading in NMS securities to transactions that provide an economically equivalent long position but would not impose any reporting requirement,[425] the Commission believes that the Rule, as adopted, has minimized this possibility. In particular, this release addresses the concerns raised by the commenter by clarifying the obligations on U.S. broker-dealers to collect information on customers in light of applicable foreign laws. In summary, a registered broker-dealer must collect the information specified by Rule 13h–1(d)(2) about the foreign intermediary's transactions if it is a large trader or an Unidentified Large Trader.[426] The broker-dealer also must collect the information specified by Rule 13h–1(d)(3) relating to Unidentified Large Traders. The Rule does not require a registered broker-dealer to collect the identifying information about the foreign intermediary's client(s).[427] Further, the Commission clarified that the Rule does not require broker-dealers to definitively determine who is, in fact, a large trader.

Finally, the Commission believes that, because the reporting requirements applied to all large traders (both U.S. and foreign) will be minimal, they will not negatively impact the competitiveness of U.S. markets.

B. Capital Formation

New Rule 13h–1 is intended to facilitate the Commission's ability to monitor the impact on the securities markets of securities transactions involving a substantial volume of shares, a large fair market value or a large exercise value, as well as to assist the Commission's enforcement of the federal securities laws. The Rule focuses on the core of the large trader reporting requirements—the entities that control persons that exercise investment discretion and are responsible for trading large amounts of securities. As these entities can represent significant sources of liquidity and overall trading volume, their trading may have a direct impact on the cost of capital of securities issuers. As such, the Commission's ability to promptly obtain information from registered broker-dealers on large trader activity should better enable the Commission to understand the impact of large traders on the securities markets. As the Commission improves its understanding, it should be better positioned to administer and enforce the federal securities laws, thereby promoting the integrity and efficiency of the markets, as well as, ultimately, investor trust and capital formation. For example, the information collected from Rule 13h–1(d) would allow for a more timely reconstruction of trading activity during a market crisis and thus could better position the Commission to craft any regulatory responses.

However, one commenter expressed concern that a potential consequence of a large trader reporting rule might be to deprive U.S. markets of capital that will instead flow to alternative market centers that provide an economically equivalent long position but would not impose any reporting requirement to the extent that foreign traders seek to avoid trading in reportable NMS securities.[428] The consequence could be to deprive U.S. markets of capital, and to possibly create pricing disparities between economically equivalent non-reportable transactions and their analog reportable transactions.[429]

The commenter based its concerns on certain aspects of the Proposed Rule that it believed would impact non-U.S. traders. One concern was that potential non-U.S. traders would have little or no experience in dealing with Commission regulation and may not even realize they are subject to identifying and reporting requirements.[430] Another concern involved how a broker-dealer would be expected to collect information from non-U.S. intermediaries and the impact of privacy laws on the ability to collect information and for large traders to report such information.[431] A third concern involved the practicality of the proposed requirement for large traders to list account numbers on Form 13H.[432]

The Commission is mindful of these comments and believes that the modifications and clarifications in the adopted Rule and discussed in detail above should mitigate these concerns. For example, as adopted, the Rule does not require account numbers to be included on Form 13H, alleviating the commenters' concern about the practicality of non-U.S. traders providing this information. Also as discussed above, the scope of the monitoring requirements has been clarified in the adopted Rule such that the obligations of broker-dealers to collect information from non-U.S. parties is limited to only the non-U.S. entity with whom they transact. Furthermore, in the event, which the Commission believes to be unlikely, that the laws of a large trader's foreign jurisdiction preclude or prohibit the large trader from waiving such restrictions or otherwise voluntarily filing Form 13H with the Commission, then such foreign large traders or representatives of foreign large traders may request an exemption from the Commission pursuant to Section 36 of the Exchange Act[433] and paragraph (g) of the Rule.

Given these mitigating factors, the Commission does not believe that any remaining costs to a non-U.S. trader that trades in an amount sufficient to require identification with the Commission via Form 13H outweigh the considerable benefits of directly accessing U.S. markets for the trading of NMS securities. Moreover, armed with more current and accurate trading information on large traders, the Commission would be able to identify regulatory and potential enforcement issues more quickly. Thus, Rule 13h–1 could help maintain investor trust in the markets, and in turn could add depth and liquidity to the markets and promote capital formation. Further, the Commission believes that the requirements imposed on all large traders, whether U.S. or foreign, are necessary and appropriate, not unduly burdensome, and would be imposed

[425] *See* European Banking Federation and Swiss Bankers Association Letter at 4.

[426] *See* discussion *supra* at Section III.B.3 (explaining when a registered broker-dealer must treat its customer as an Unidentified Large Trader).

[427] The legislative history indicates that the Commission stated that it ''would not impose requirements on broker-dealers to report beneficial ownership information that is not recorded in the normal course of business.'' Senate Report, *supra* note 14, at 42. The Committee specifically noted that many broker-dealers currently maintain no beneficial ownership records of transactions of foreign persons that are carried out through banks, particularly foreign banks, which serve as the record holder of such securities. *See id.* The Committee expected that such beneficial owners would not be assigned LTIDs. *See id.* As discussed above, for all persons (both foreign and domestic), large trader status is triggered by the exercise of investment discretion, not mere beneficial ownership of NMS securities.

[428] *See* European Banking Federation and Swiss Bankers Association Letter at 4–5.

[429] *See id.*

[430] *See id.* at 2.

[431] *See id.* at 3.

[432] *See id.* at 3–4.

[433] 15 U.S.C. 78mm.

uniformly on all affected entities (whether U.S. or non-U.S.).

C. Efficiency

New Rule 13h–1 is designed to achieve the appropriate balance between the Commission's goals of monitoring the impact on the securities markets of securities transactions by large traders and assisting the Commission's enforcement of the federal securities laws, on the one hand, and the effort to minimize the burdens and costs associated with implementing a large trader reporting rule.

The Commission believes that the disclosure by registered broker-dealers to regulators that would be achieved by the large trader reporting rule would promote efficiency by enabling the Commission to go beyond the EBS system, which permits investigations of small samples of securities over a limited period of time, and to instead assist with large-scale investigations and market reconstructions involving numerous stocks during peak trading volume periods. The Rule also would enable the Commission to receive from registered broker-dealers contemporaneous information on large traders' trading activity much more promptly than is currently the case with the EBS system. With a system designed specifically to help the Commission reconstruct and analyze time-sequenced trading data, the Commission could more quickly investigate the nature and causes of unusual market movements and initiate investigations and regulatory actions where warranted.

The Commission acknowledges that the trading activity of certain large traders also promotes market liquidity in secondary securities markets. The Commission also acknowledges that participation in primary market offerings may be affected by changes in expectations about secondary market liquidity and price efficiency. As discussed above, however, the Commission believes that Rule 13h–1 will enhance the Commission's efforts to monitor the markets, in furtherance of promoting efficiency and capital formation and thereby bolstering investor trust.

VII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'')[434] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a)[435] of the Administrative Procedure Act,[436] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on ''small entities.''[437] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule or proposed rule amendment, which if adopted, would not ''have a significant economic impact on a substantial number of small entities.''[438]

Paragraph (a) of Rule 0–10 provides that for purposes of the Regulatory Flexibility Act, a small entity when used with reference to a ''person' '' other than an investment company means a person that, on the last day of its most recent fiscal year, had total assets of $5 million or less.[439] In reference to a broker-dealer, small entity means total capital of less than $500,000 and not affiliated with any person that is not a small business or small organization. Pursuant to Section 605(b), the Commission believes that Rule 13h–1 and Form 13H will not have a significant economic impact on a substantial number of small entities.

In the Proposing Release, the Commission requested comment on whether proposed Rule 13h–1 and Form 13H would have a significant economic impact on a substantial number of small entities. While the Commission did receive comment letters that discussed the overall number of respondents that would be affected by the proposed new rule,[440] the Commission did not receive any comments that specifically addressed whether Rule 13h–1 and Form 13H would have a significant economic impact on small entities.

Rule 13h–1 and Form 13H will require self-identification by large traders, which is a term that, as discussed below, would implicate persons and entities with the resources and capital necessary to transact securities in substantial volumes relative to overall market volume in NMS securities.[441] Specifically, the Rule defines ''large trader'' as a person that effects transactions in an ''identifying activity level'' of: (1) 2 million shares, or shares with a fair market value of $20 million, effected during a calendar day; or (2) 20 million shares, or shares with a fair market value of $200 million, effected during a calendar month.

The Commission anticipates that the types of entities that would identify as large traders would include, for example, broker-dealers, financial holding companies, investment advisers, and firms that trade for their own account. The Commission does not believe that any small entities would be engaged in the business of trading, over the course of the applicable measuring period, in a volume that approaches the threshold levels. Because the Rule focuses on parent companies and is designed to identify the largest market participants by volume or fair market value of trading, the Commission believes that a large trader that trades in such substantial volumes would necessarily have considerable assets (beyond the level of a small entity) to be able to conduct such trading.

In addition, Rule 13h–1 will apply to registered broker-dealers that serve large trader customers. The Commission believes that, given the considerable volume in which a large trader as defined in the Rule would effect transactions, particularly in the case of high-frequency traders, registered broker-dealers servicing large trader customers or broker-dealers that are large traders themselves likely would be larger entities, with total capital greater than $500,000, and have systems and capacities capable of handling the trading associated with such accounts. Further, because the trading capacities of large traders will typically necessitate the services of sophisticated broker-dealers likely to be well capitalized entities or affiliated with well capitalized entities, the Commission does not believe that any broker-dealer that maintains large trader customers would be ''not affiliated with any person that is not a small business or small organization'' under Rule 0–10.

For the foregoing reasons, the Commission hereby certifies that, pursuant to 5 U.S.C. 605(b), Rule 13h–1 will not have a significant economic impact on a substantial number of small entities.

VIII. Statutory Authority

Pursuant to the Exchange Act and particularly, Sections 13(h) and 23(a)

[434] 5 U.S.C. 601 *et seq.*

[435] 5 U.S.C. 603(a).

[436] 5 U.S.C. 551 *et seq.*

[437] Although Section 601(b) of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term small entity for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10. *See* Securities Exchange Act Release No. 18451 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS–305).

[438] *See* 5 U.S.C. 605(b).

[439] 17 CFR 240.0–10(a). Investment companies are small entities when the investment company, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less at the end of its most recent fiscal year. 17 CFR 270.0–10(a).

[440] *See supra* Section IV.C.

[441] *See supra* text accompanying note 61.

thereof, 15 U.S.C. 78m(h) and 78w(a), the Commission adopts new Rule 13h–1 under the Exchange Act that will implement a large trader reporting rule to provide the Commission with a mechanism to identify large traders, and the affiliates, accounts, and transactions of large traders.

IX. Text of the Amendments

List of Subjects in 17 CFR Parts 240 and 249

Reporting and recordkeeping requirements; Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for Part 240 continues to read in part 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, 78n–1, 78*o,* 78*o*–4, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–ll, and 7201 *et seq.;* 18 U.S.C. 1350, 12 U.S.C. 5221(e)(3); and 7 U.S.C. 2(c)(2)(E), unless otherwise noted.

* * * * *

■ 2. Add § 240.13h–1 to read as follows:

§ 240.13h–l Large trader reporting.

(a) *Definitions.* For purposes of this section:

(1) The term *large trader* means any person that:

(i) Directly or indirectly, including through other persons controlled by such person, exercises investment discretion over one or more accounts and effects transactions for the purchase or sale of any NMS security for or on behalf of such accounts, by or through one or more registered broker-dealers, in an aggregate amount equal to or greater than the identifying activity level; or

(ii) Voluntarily registers as a large trader by filing electronically with the Commission Form 13H (§ 249.327 of this chapter).

(2) The term *person* has the same meaning as in Section 13(h)(8)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(h)(8)(E)).

(3) The term *control* (including the terms *controlling, controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of securities, by contract, or otherwise. For purposes of this section only, any person that directly or indirectly has the right to vote or direct the vote of 25% or more of a class of voting securities of an entity or has the power to sell or direct the sale of 25% or more of a class of voting securities of such entity, or in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25% or more of the capital, is presumed to control that entity.

(4) The term *investment discretion* has the same meaning as in Section 3(a)(35) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(3)(a)(35)). A person's employees who exercise investment discretion within the scope of their employment are deemed to do so on behalf of such person.

(5) The term *NMS security* has the meaning provided for in Section 242.600(b)(46) of this chapter.

(6) The term *transaction* or *transactions* means all transactions in NMS securities, excluding the purchase or sale of such securities pursuant to exercises or assignments of option contracts. For the sole purpose of determining whether a person is a large trader, the following transactions are excluded from this definition:

(i) Any journal or bookkeeping entry made to an account in order to record or memorialize the receipt or delivery of funds or securities pursuant to the settlement of a transaction;

(ii) Any transaction that is part of an offering of securities by or on behalf of an issuer, or by an underwriter on behalf of an issuer, or an agent for an issuer, whether or not such offering is subject to registration under the Securities Act of 1933 (15 U.S.C. 77a), provided, however, that this exemption shall not include an offering of securities effected through the facilities of a national securities exchange;

(iii) Any transaction that constitutes a gift;

(iv) Any transaction effected by a court appointed executor, administrator, or fiduciary pursuant to the distribution of a decedent's estate;

(v) Any transaction effected pursuant to a court order or judgment;

(vi) Any transaction effected pursuant to a rollover of qualified plan or trust assets subject to Section 402(a)(5) of the Internal Revenue Code (26 U.S.C. 1 *et seq.*);

(vii) Any transaction between an employer and its employees effected pursuant to the award, allocation, sale, grant, or exercise of a NMS security, option or other right to acquire securities at a pre-established price pursuant to a plan which is primarily for the purpose of an issuer benefit plan or compensatory arrangement; or

(viii) Any transaction to effect a business combination, including a reclassification, merger, consolidation, or tender offer subject to Section 14(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(d)); an issuer tender offer or other stock buyback by an issuer; or a stock loan or equity repurchase agreement.

(7) The term *identifying activity level* means: aggregate transactions in NMS securities that are equal to or greater than:

(i) During a calendar day, either two million shares or shares with a fair market value of $20 million; or

(ii) During a calendar month, either twenty million shares or shares with a fair market value of $200 million.

(8) The term *reporting activity level* means:

(i) Each transaction in NMS securities, effected in a single account during a calendar day, that is equal to or greater than 100 shares;

(ii) Any transaction in NMS securities for fewer than 100 shares, effected in a single account during a calendar day, that a registered broker-dealer may deem appropriate; or

(iii) Such other amount that may be established by order of the Commission from time to time.

(9) The term *Unidentified Large Trader* means each person who has not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this section that a registered broker-dealer knows or has reason to know is a large trader. For purposes of determining under this section whether a registered broker-dealer has reason to know that a person is large trader, a registered broker-dealer need take into account only transactions in NMS securities effected by or through such broker-dealer.

(b) *Identification requirements for large traders.*

(1) *Form 13H.* Except as provided in paragraph (b)(3) of this section, each large trader shall file electronically Form 13H (17 CFR 249.327) with the Commission, in accordance with the instructions contained therein:

(i) Promptly after first effecting aggregate transactions, or after effecting aggregate transactions subsequent to becoming inactive pursuant to paragraph (b)(3) of this section, equal to or greater than the identifying activity level;

(ii) Within 45 days after the end of each full calendar year; and

(iii) Promptly following the end of a calendar quarter in the event that any of the information contained in a Form 13H filing becomes inaccurate for any reason.

(2) *Disclosure of large trader status.* Each large trader shall disclose to the registered broker-dealers effecting transactions on its behalf its large trader identification number and each account to which it applies. A large trader on Inactive Status pursuant to paragraph (b)(3) of this section must notify broker-dealers promptly after filing for reactivated status with the Commission.

(3) *Filing requirement.*

(i) *Compliance by controlling person.* A large trader shall not be required to separately comply with the requirements of this paragraph (b) if a person who controls the large trader complies with all of the requirements under paragraphs (b)(1), (b)(2), and (b)(4) of this section applicable to such large trader with respect to all of its accounts.

(ii) *Compliance by controlled person.* A large trader shall not be required to separately comply with the requirements of this paragraph (b) if one or more persons controlled by such large trader collectively comply with all of the requirements under paragraphs (b)(1), (b)(2), and (b)(4) of this section applicable to such large trader with respect to all of its accounts.

(iii) *Inactive status.* A large trader that has not effected aggregate transactions at any time during the previous full calendar year in an amount equal to or greater than the identifying activity level shall become inactive upon filing a Form 13H (17 CFR 249.327) and thereafter shall not be required to file Form 13H or disclose its large trader status unless and until its transactions again are equal to or greater than the identifying activity level. A large trader that has ceased operations may elect to become inactive by filing an amended Form 13H to indicate its terminated status.

(4) *Other information.* Upon request, a large trader must promptly provide additional descriptive or clarifying information that would allow the Commission to further identify the large trader and all accounts through which the large trader effects transactions.

(c) *Aggregation.*

(1) *Transactions.* For the purpose of determining whether a person is a large trader, the following shall apply:

(i) The volume or fair market value of transactions in equity securities and the volume or fair market value of the equity securities underlying transactions in options on equity securities, purchased and sold, shall be aggregated;

(ii) The fair market value of transactions in options on a group or index of equity securities (or based on the value thereof), purchased and sold, shall be aggregated; and

(iii) Under no circumstances shall a person subtract, offset, or net purchase and sale transactions, in equity securities or option contracts, and among or within accounts, when aggregating the volume or fair market value of transactions for purposes of this section.

(2) *Accounts.* Under no circumstances shall a person disaggregate accounts to avoid the identification requirements of this section.

(d) *Recordkeeping requirements for broker and dealers.*

(1) *Generally.* Every registered broker-dealer shall maintain records of all information required under paragraphs (d)(2) and (d)(3) of this section for all transactions effected directly or indirectly by or through:

(i) An account such broker-dealer carries for a large trader or an Unidentified Large Trader, or

(ii) If the broker-dealer is a large trader, any proprietary or other account over which such broker-dealer exercises investment discretion.

(iii) Additionally, where a non-broker-dealer carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting transactions directly or indirectly for such large trader or Unidentified Large Trader shall maintain records of all of the information required under paragraphs (d)(2) and (d)(3) of this section for those transactions.

(2) *Information.* The information required to be maintained for all transactions shall include:

(i) The clearing house number or alpha symbol of the broker or dealer submitting the information and the clearing house numbers or alpha symbols of the entities on the opposite side of the transaction;

(ii) Identifying symbol assigned to the security;

(iii) Date transaction was executed;

(iv) The number of shares or option contracts traded in each specific transaction; whether each transaction was a purchase, sale, or short sale; and, if an option contract, whether the transaction was a call or put option, an opening purchase or sale, a closing purchase or sale, or an exercise or assignment;

(v) Transaction price;

(vi) Account number;

(vii) Identity of the exchange or other market center where the transaction was executed.

(viii) A designation of whether the transaction was effected or caused to be effected for the account of a customer of such registered broker-dealer, or was a proprietary transaction effected or caused to be effected for the account of such broker-dealer;

(ix) If part or all of an account's transactions at the registered broker-dealer have been transferred or otherwise forwarded to one or more accounts at another registered broker-dealer, an identifier for this type of transaction; and if part or all of an account's transactions at the reporting broker-dealer have been transferred or otherwise received from one or more other registered broker-dealers, an identifier for this type of transaction;

(x) If part or all of an account's transactions at the reporting broker-dealer have been transferred or otherwise received from another account at the reporting broker-dealer, an identifier for this type of transaction; and if part or all of an account's transactions at the reporting broker-dealer have been transferred or otherwise forwarded to one or more other accounts at the reporting broker-dealer, an identifier for this type of transaction;

(xi) If a transaction was processed by a depository institution, the identifier assigned to the account by the depository institution;

(xii) The time that the transaction was executed; and

(xiii) The large trader identification number(s) associated with the account, unless the account is for an Unidentified Large Trader.

(3) *Information relating to Unidentified Large Traders.* With respect to transactions effected directly or indirectly by or through the account of an Unidentified Large Trader, the information required to be maintained for all transactions also shall include such Unidentified Large Trader's name, address, date the account was opened, and tax identification number(s).

(4) *Retention.* The records and information required to be made and kept pursuant to the provisions of this section shall be kept for such periods of time as provided in § 240.17a–4(b).

(5) *Availability of information.* The records and information required to be made and kept pursuant to the provisions of this rule shall be available on the morning after the day the transactions were effected (including Saturdays and holidays).

(e) *Reporting requirements for brokers and dealers.* Upon the request of the Commission, every registered broker-dealer who is itself a large trader or carries an account for a large trader or an Unidentified Large Trader shall electronically report to the Commission, using the infrastructure supporting § 240.17a–25, in machine-readable form

and in accordance with instructions issued by the Commission, all information required under paragraphs (d)(2) and (d)(3) of this section for all transactions effected directly or indirectly by or through accounts carried by such broker-dealer for large traders and Unidentified Large Traders, equal to or greater than the reporting activity level. Additionally, where a non-broker-dealer carries an account for a large trader or an Unidentified Large Trader, the broker-dealer effecting such transactions directly or indirectly for a large trader shall electronically report using the infrastructure supporting § 240.17a–25, in machine-readable form and in accordance with instructions issued by the Commission, all information required under paragraphs (d)(2) and (d)(3) of this section for such transactions equal to or greater than the reporting activity level. Such reports shall be submitted to the Commission no later than the day and time specified in the request for transaction information, which shall be no earlier than the opening of business of the day following such request, unless in unusual circumstances the same-day submission of information is requested.

(f) *Monitoring safe harbor.* For the purposes of this rule, a registered broker-dealer shall be deemed not to know or have reason to know that a person is a large trader if it does not have actual knowledge that a person is a large trader and it establishes policies and procedures reasonably designed to:

(1) Identify persons who have not complied with the identification requirements of paragraphs (b)(1) and (b)(2) of this section but whose transactions effected through an account or a group of accounts carried by such broker-dealer or through which such broker-dealer executes transactions, as applicable (and considering account name, tax identification number, or other identifying information available on the books and records of such broker-dealer) equal or exceed the identifying activity level;

(2) Treat any persons identified in paragraph (f)(1) of this section as an Unidentified Large Trader for purposes of this section; and

(3) Inform any person identified in paragraph (f)(1) of this section of its potential obligations under this section.

(g) *Exemptions.* Upon written application or upon its own motion, the Commission may by order exempt, upon specified terms and conditions or for stated periods, any person or class of persons or any transaction or class of transactions from the provisions of this section to the extent that such exemption is consistent with the purposes of the Securities Exchange Act of 1934 (15 U.S.C. 78a).

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 4. Add § 249.327 to read as follows:

§ 249.327 Form 13H, Information required on large traders pursuant to Section 13(h) of the Securities Exchange Act of 1934 and rules thereunder.

This form shall be used by persons that are large traders required to furnish identifying information to the Commission pursuant to Section 13(h)(1) of the Securities Exchange Act of 1934 [15 U.S.C. 78m(h)(1)] and § 240.13h–1(b) of this chapter.

Note: The text of Form 13H does not, and this amendment will not, appear in the Code of Federal Regulations.

- OMB Number: 3235–0862
- Estimated average burden hours per response: 18

United States Securities and Exchange Commission

FORM 13H

Large Trader Registration

Information Required of Large Traders Pursuant to Section 13(h) of the Securities Exchange Act of 1934 and Rules Thereunder

[ ] INITIAL FILING: Date identifying transactions first effected (mm/dd/yyyy) _____

Voluntary filing? [ ] no [ ] yes
Date of voluntary filing _____

[ ] ANNUAL FILING: Calendar year ending _____

[ ] AMENDED FILING

[ ] INACTIVE STATUS: Date commencing Inactive Status (mm/dd/yyyy) _____

[ ] TERMINATION FILING: Effective date (mm/dd/yyyy) _____

[ ] REACTIVATED STATUS: Date identifying transactions first effected, post-Inactive Status (mm/dd/yyyy) _____

_____
Name of Large Trader Filing This Form

_____
LTID

_____
Taxpayer Identification Number

_____
Business Address of the Large Trader (Street, City, State, Zip, Country)

_____
Mailing Address of the Large Trader (Street, City, State, Zip, Country)

Telephone No ( ) ____ – _____
Facsimile No. ( ) ____ – _____
Email _____

The Form and the schedules thereto must be submitted by a natural person who is authorized to make this submission on behalf of the large trader.

_____
Name of Authorized Person (First, Middle Initial, Last)

_____
Title of Authorized Person

_____
Relationship to Large Trader

_____
Business Address of Authorized Person (Street, City, State, Zip, Country)

_____
Authorized Person's Telephone No. ( ) _____ – _____
Facsimile No. ( ) _____ – _____
Authorized Person's Email

_____

ATTENTION

Intentional misstatements or omissions of facts constitute Federal Criminal Violations. *See* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a). Intentional misstatements or omissions of facts may result in civil fines and other sanctions pursuant to the Securities Exchange Act of 1934.

The authorized person signing this form represents that all information contained in the form, schedules, and continuation sheets is true, correct, and complete. It is understood that all information whether contained in the form, schedules, or continuation sheets, is considered an integral part of this form and that any amendment represents that all unamended information remains true, correct, and complete.

_____
Signature of Person Authorized to Submit this Form

FORM 13H

INFORMATION REQUIRED OF ALL LARGE TRADERS

ITEM 1. BUSINESSES OF THE LARGE TRADER (check as many as applicable)

(a) Businesses engaged in by the large trader and any of the large trader's affiliates (check as many as applicable)

[ ] Broker or Dealer
[ ] Government Securities Broker or Dealer
[ ] Municipal Securities Broker or Dealer

[ ] Investment Adviser
[ ] to Registered Investment Companies
[ ] to Hedge Funds or other Funds not registered under the Investment Company Act
[ ] Futures Commission Merchant
[ ] Commodity Pool Operator
[ ] Bank Holding Company
[ ] Non-Bank Holding Company
[ ] Bank
[ ] Pension Trustee
[ ] Non-Pension Trustee
[ ] Insurance Company
[ ] Other (specify) _____

(b) Describe the nature of the business of the large trader including a description for each Securities Affiliate:

_____
_____
_____
_____

ITEM 2. SECURITIES AND EXCHANGE COMMISSION FILINGS

Does the large trader or any of its Securities Affiliates file any other forms with the Commission?
[ ] Yes [ ] No
If yes, specify the entity and the forms filed:

Entity	Form(s) filed	CIK No.

ITEM 3. CFTC REGISTRATION AND FOREIGN REGULATORS

(a) Is the large trader or any of its affiliates registered with the Commodity Futures Trading Commission in any capacity, including as a ''registered trader'' pursuant to sections 4i and 9 of the Commodity Exchange Act?
[ ] Yes [ ] No
If yes, identify each entity and specify the registration number:

Entity	Registration No.

(b) Is the large trader or any of its Securities Affiliates regulated by a foreign regulator?
[ ] Yes [ ] No
If yes, identify each entity and its primary foreign regulator(s):

Entity	Primary foreign regulator

ITEM 4. ORGANIZATION INFORMATION

(a) Attach an Organizational Chart that identifies the large trader, its parent company (if applicable), all Securities Affiliates, and all entities identified in Item 3(a).

(b) Provide the following information on all Securities Affiliates and all entities identified in Item 3(a):

Entity	MPID(s)	Description of business	Relationship to the large trader

(c) If any affiliates file separately, identify each entity:

Entity	LTID	Suffix (if any)

(d) If any affiliates have been assigned an LTID suffix, identify such entities and their corresponding suffixes:

Entity	Suffix

ITEM 5. GOVERNANCE OF THE LARGE TRADER

(a) STATUS OF THE LARGE TRADER (check as many as apply)

[ ] Individual
[ ] Trustee
[ ] Limited Liability Company
[ ] Partnership
[ ] Limited Partnership
[ ] Corporation
[ ] Other (specify) _____

(b) Complete the following for each general partner, and in the case of limited partnerships, each limited partner that is the owner of more than a 10 percent financial interest in the accounts of the large trader:

Name	Status (check one for each)
	[ ] General Partner [ ] Limited Partner.
	[ ] General Partner [ ] Limited Partner.
	[ ] General Partner [ ] Limited Partner.
	[ ] General Partner [ ] Limited Partner.
	[ ] General Partner [ ] Limited Partner.
	[ ] General Partner [ ] Limited Partner.
	[ ] General Partner [ ] Limited Partner.

(c) Complete the following for each executive officer, director, or trustee of a large trader corporation or trustee:

Name	Status (check one for each)
	[ ] Executive Officer [ ] Director [ ] Trustee.
	[ ] Executive Officer [ ] Director [ ] Trustee.
	[ ] Executive Officer [ ] Director [ ] Trustee.
	[ ] Executive Officer [ ] Director [ ] Trustee.
	[ ] Executive Officer [ ] Director [ ] Trustee.
	[ ] Executive Officer [ ] Director [ ] Trustee.
	[ ] Executive Officer [ ] Director [ ] Trustee.

(d) Jurisdiction in which the large trader entity is incorporated or organized:

_____
(state and country)

ITEM 6. LIST OF BROKER-DEALERS AT WHICH THE LARGE TRADER OR ITS SECURITIES AFFILIATES HAS AN ACCOUNT

Identify each broker-dealer at which the large trader or any of its Securities Affiliates has an account and the types of services provided.

Name of Broker-Dealer	
_____	[ ] Prime Broker
	[ ] Executing Broker
	[ ] Clearing Broker.
_____	[ ] Prime Broker
	[ ] Executing Broker
	[ ] Clearing Broker.
_____	[ ] Prime Broker
	[ ] Executing Broker
	[ ] Clearing Broker.
_____	[ ] Prime Broker
	[ ] Executing Broker
	[ ] Clearing Broker.
_____	[ ] Prime Broker
	[ ] Executing Broker
	[ ] Clearing Broker.
_____	[ ] Prime Broker
	[ ] Executing Broker
	[ ] Clearing Broker.
_____	[ ] Prime Broker
	[ ] Executing Broker
	[ ] Clearing Broker.
_____	[ ] Prime Broker
	[ ] Executing Broker
	[ ] Clearing Broker.
_____	[ ] Prime Broker
	[ ] Executing Broker
	[ ] Clearing Broker.
_____	[ ] Prime Broker
	[ ] Executing Broker
	[ ] Clearing Broker.

INSTRUCTIONS FOR FORM 13H

Submission of the Form. All submissions on Form 13H must be filed electronically through the Commission's Electronic Data Gathering, Analysis, and Retrieval (''EDGAR'') system. For more information on filing through EDGAR, including instructions on how to obtain access to and file electronically through EDGAR, see the EDGAR Filer Manual (available on the Commission's website at: *http://www.sec.gov/info/edgar.shtml*).

Definitions. The term ''*Securities Affiliate*'' means an affiliate of the large trader that exercises investment discretion over NMS securities.

The term ''*affiliate*'' means any person that directly or indirectly controls, is under common control with, or is controlled by the large trader.

The term ''*bank*'' means a national bank, state member bank of the Federal Reserve System, state non-member bank, savings bank or association, credit union, or foreign bank.

The term ''*executive officer*'' means ''policy-making officer'' and otherwise is interpreted in accordance with Rule 16a–1(f) under the Exchange Act.

Type of Filing. Indicate the type of Form 13H filing by checking the appropriate box at the top of the cover page to Form 13H. All filings must include a valid digital signature.

If the filing is an ''Initial Filing,'' indicate whether it is a voluntary filing. Voluntary filings are submitted regardless of whether the aggregate number of transactions effected reached the identifying activity level. For voluntary filings, the large trader must input the date on which it submits its voluntary filing. For non-voluntary filings, the large trader must input the first date on which the aggregate number of transactions effected reached the identifying activity level. A non-voluntary ''Initial Filing'' must be submitted promptly after first effecting an aggregate number of transactions equal to or greater than the identifying activity level.

If the filing is an ''Annual Filing,'' input the applicable calendar year.

An ''Amended Filing'' must be filed promptly following the end of the calendar quarter in which any of the information contained in a Form 13H filing becomes inaccurate for any reason. A large trader must file an ''Amended Filing'' when, for example, it changes its name, business address, organization type (*e.g.,* the large trader partnership reincorporates as a limited liability company), or regulatory status (*e.g.,* a hedge fund registers under the Investment Company Act), or when its organizational chart changes in a manner relevant under Item 4(a) (*e.g.,* it adds or removes a Securities Affiliate).

If the filing is for ''Inactive Status,'' input the date that the large trader qualified for Inactive Status. A large trader that has not effected aggregate transactions at any time during the previous full calendar year in an aggregate amount equal to or greater than the identifying activity level may file for Inactive Status. A large trader shall become inactive, and exempt from the filing and self-identification requirements upon filing for Inactive Status until the identifying activity level is reached again.

If the filing is for ''Reactivated Status,'' indicate the date that the aggregate number of transactions again reached or exceeded the identifying activity level. A filing for ''Reactivated Status'' must be submitted promptly after effecting an aggregate number of transactions—subsequent to filing for ''Inactive Status''—equal to or greater than the identifying activity level. In addition, a person may voluntarily elect to file for Reactivated Status prior to effecting aggregate transactions that are equal to or greater than the identifying activity threshold. For such voluntarily filings for ''Reactivated Status,'' the date of the voluntarily filing should be entered rather than the date that the aggregate number of transactions again reached or exceeded the identifying activity level.

If the filing is a ''Termination Filing,'' indicate the date on which the large trader ceased operation. For example, when one large trader merges into another large trader, resulting in only one surviving entity, the non-surviving large trader should specify the effective date of the merger in its Termination Filing.

The Form also requires that a large trader input its Taxpayer Identification Number. The Form further requires a large trader to input its business and mailing addresses. If those addresses are the same, for the mailing address field, the large trader may either input its address again or input ''same.''

The Form must be filed by a natural person who is authorized to submit it on behalf of the large trader. The Commission may require the large trader to provide descriptive or clarifying information about the information disclosed in the Form 13H, and will contact the Authorized Person to provide such information.

To amend the name, phone number, and email address of the large trader, the large trader must modify its EDGAR profile. Thereafter, changes will automatically be reflected in the Form 13H.

Item 1. Businesses of the Large Trader. Item 1 of the Form requires the large trader to specify, from among the enumerated choices, the types of business engaged in by the large trader, by checking as many as are applicable. Select ''Other'' to indicate a financial entity not included in any of the enumerated categories and enter a short description for each such entity. In addition, select ''Other'' if the large trader is an individual and input his or her occupation.

A large trader also is required, for itself and each of its Securities Affiliates, to describe the nature of its operations, including a general description of its trading strategies. As an example, the following would be an appropriate description: ''Registered market-maker on [SRO], authorized participant for a number of ETFs based on foreign indices, and proprietary trading focusing on statistical arbitrage.''

Item 2. Securities and Exchange Commission Filings. The large trader must indicate whether it or any of its Securities Affiliates files forms with the Commission. If it checks ''Yes,'' the large trader must input the names of the filing entities and, for each of them, input the form(s) they file and the applicable CIK number.

Item 3. CFTC Registration and Foreign Regulators.

Item 3(a) requires the large trader to indicate whether it or any of its affiliates

is registered with the Commodity Futures Trading Commission in any capacity, including as a ''registered trader'' pursuant to Sections 4i and 9 of the Commodity Exchange Act. If it checks ''Yes,'' the large trader must input the name of each such entity and the registration number for each such entity.

Item 3(b) requires the large trader to indicate whether it or any of its Securities Affiliates is regulated by a foreign regulator. Unlike Item 3(a), Item 3(b) applies only to the large trader and its Securities Affiliates. If it checks ''Yes,'' the large trader must input the name of each such regulated entity and its primary foreign regulator.

Item 4. Organization Information.

To comply with Item 4(a), the large trader must attach an organizational chart that depicts the organization of the large trader. At a minimum, the chart must include the large trader, its parent company (if applicable), all Securities Affiliates, and all entities identified in Item 3(a) of the Form (if any) (collectively, ''Item 4 Affiliates'').

Item 4(b) requires that a large trader provide information about the Item 4 Affiliates. Specifically, the large trader must input the names of Item 4 Affiliates and, for each one of them, also input the following information: MPID(s); a brief description of its business, and its relationship to the large trader.

Item 4(c) requires that a large trader identify all affiliates that file a separate Form 13H. Those affiliates will have a different LTID.

Item 4(d) permits a large trader to assign LTID suffixes to one or more of its Securities Affiliates. A suffix should have no more than three characters, all of which must be numbers; no letters or special characters may be used. The same suffix may not be assigned to more than one affiliate using the same LTID.

Item 5. Governance of the Large Trader.

Item 5 captures basic information about the large trader organization. All terms have the meanings generally ascribed to them in the United States. If a foreign organization type has no comparable corporate form, check ''Other'' and input the organization type. A large trader who is a natural person must check ''Individual.''

Item 6. List of Broker-Dealers at Which the Large Trader or Its Securities Affiliates Has an Account.

Item 6 requires that a large trader identify each broker-dealer at which the large trader and any Securities Affiliate has an account. Additionally, for each such broker-dealer, the large trader must indicate the type(s) of services provided. The large trader must check as many of the following that apply: Prime Broker; Executing Broker; Clearing Broker.

Paperwork Reduction Act Disclosures. This collection of information has been reviewed by OMB in accordance with the clearance requirements of 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Responses to this collection are mandatory, pursuant to Section 13(h) of the Exchange Act and Rule 13h–1 thereunder. The Commission will treat as confidential the information collected pursuant to this Form in a manner consistent with Section 13(h)(7) of the Exchange Act, which sets forth a few limited exceptions.

The Commission will use the information collected pursuant to this Form 13H to identify significant market participants, *i.e.,* large traders. Form 13H will allow the Commission to collect background information about large traders, which will contribute to the agency's ability to conduct investigations and enforcement matters. The Commission estimates that the average burden to respond to the Form 13H will be 18 hours. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

By the Commission.

Dated: July 27, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19419 Filed 8–2–11; 8:45 am]

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Part IV

Fish and Wildlife Services

50 CFR Parts 18

Marine Mammals; Incidental Take During Specified Activities; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 18

[Docket No. FWS–R7–FHC–2010–0098; 71490–1351–0000–L5–FY11]

RIN 1018–AX32

Marine Mammals; Incidental Take During Specified Activities

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Fish and Wildlife Service (Service) has developed regulations that would authorize the nonlethal, incidental, unintentional take of small numbers of polar bears and Pacific walruses during year-round oil and gas industry (Industry) exploration, development, and production operations in the Beaufort Sea and adjacent northern coast of Alaska. Industry operations for the covered period include types of activities similar to those covered by the previous 5-year Beaufort Sea incidental take regulations that were effective from August 2, 2006, through August 2, 2011. We find that the total expected takings of polar bears and Pacific walruses during oil and gas industry exploration, development, and production activities will have a negligible impact on these species and will not have an unmitigable adverse impact on the availability of these species for subsistence use by Alaska Natives. We base this finding on the results of 17 years of data on the encounters and interactions between polar bears, Pacific walruses, and Industry; recent studies of potential effects of Industry on these species; oil spill risk assessments; potential and documented Industry impacts on these species; and current information regarding the natural history and status of polar bears and Pacific walruses. This rule is effective for 5 years from date of issuance.

DATES: This rule is effective August 3, 2011, and remains effective through August 3, 2016.

ADDRESSES: The final rule and associated environmental assessment (EA) are available for viewing at *http://http://www.regulations.gov* at Docket No, FWS–R7–FHC–2010–0098.

Comments and materials received in response to this action are available for public inspection during normal working hours of 8 a.m. to 4:30 p.m., Monday through Friday, at the Office of Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, AK 99503.

FOR FURTHER INFORMATION CONTACT: Craig Perham, Office of Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503, *telephone:* 907–786–3810 or 1–800–362–5148, or *e-mail: craig_perham@fws.gov.*

SUPPLEMENTARY INFORMATION:

Immediate Promulgation

In accordance with 5 U.S.C. 553(d)(3), we find that we have good cause to make this rule effective less than 30 days after publication. Immediate promulgation of the rule will ensure that Industry implements mitigation measures and monitoring programs in the geographic region that reduce the risk of lethal and nonlethal effects to polar bears and Pacific walruses by Industry activities.

Background

Section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1371(a)(5)(A)) gives the Secretary of the Interior (Secretary) through the Director of the Service the authority to allow the incidental, but not intentional, taking of small numbers of marine mammals, in response to requests by U.S. citizens [as defined in 50 CFR 18.27(c)] engaged in a specified activity (other than commercial fishing) in a specified geographic region. According to the MMPA, the Service (we) shall allow this incidental taking if (1) We make a finding that the total of such taking for the 5-year regulatory period will have no more than a negligible impact on these species and will not have an unmitigable adverse impact on the availability of these species for taking for subsistence use by Alaska Natives, and (2) we issue regulations that set forth (a) permissible methods of taking, (b) means of effecting the least practicable adverse impact on the species and their habitat and on the availability of the species for subsistence uses, and (c) requirements for monitoring and reporting. If regulations allowing such incidental taking are issued, we issue Letters of Authorization (LOA) to conduct activities under the provisions of these regulations when requested by citizens of the United States.

The term ''take,'' as defined by the MMPA, means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. Harassment, as defined by the MMPA, means ''any act of pursuit, torment, or annoyance which (i) Has the potential to injure a marine mammal or marine mammal stock in the wild'' (the MMPA calls this Level A harassment); ''or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering'' (the MMPA calls this Level B harassment).

The terms ''small numbers,'' ''negligible impact,'' and ''unmitigable adverse impact'' are defined in 50 CFR 18.27 (*i.e.,* regulations governing small takes of marine mammals incidental to specified activities) as follows. ''Small numbers'' is defined as ''a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock.'' It is necessary to note that the Service's analysis of ''small numbers'' complies with the agency's regulatory definition and is an appropriate reflection of Congress' intent. As was noted during the development of this definition (48 FR 31220; July 7, 1983), Congress itself recognized the ''imprecision of the term small numbers,'' but was unable to offer a more precise formulation because the concept is not capable of being expressed in absolute numerical limits.'' See H.R. Report No. 97–228 at 19. Thus, Congress itself focused on the anticipated effects of the activity on the species and stated that authorization should be available to persons ''whose taking of marine mammals is infrequent, unavoidable, or accidental.''

''Negligible impact'' is ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' ''Unmitigable adverse impact'' means ''an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) Causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.''

Industry conducts activities such as oil and gas exploration, development, and production in marine mammal habitat that may result in the taking of marine mammals. Although Industry is under no legal requirement to obtain incidental take authorization, since 1993, Industry has requested, and we have issued, a series of regulations for incidental take authorization for

conducting activities in areas of polar bear and walrus habitat. Since the inception of these incidental take regulations (ITRs), polar bear/walrus monitoring observations associated with the regulations have recorded more than 2,000 polar bear observations associated with Industry activities. The large majority of reported encounters have been passive observations of bears moving through the oil fields. Monitoring of Industry activities indicates that encounters with walruses are insignificant, with only 18 walruses recorded during the same period.

A detailed history of our past regulations can be found in our most recent regulation, published on August 2, 2006 (71 FR 43926). These past regulations were published on:

- November 16, 1993 (58 FR 60402);
- August 17, 1995 (60 FR 42805);
- January 28, 1999 (64 FR 4328);
- February 3, 2000 (65 FR 5275);
- March 30, 2000 (65 FR 16828);
- November 28, 2003 (68 FR 66744); and
- August 2, 2006 (71 FR 43926).

Summary of Current Request

In 2009, the Service received a petition to promulgate a renewal of regulations for nonlethal incidental take of small numbers of walruses and polar bears in the Beaufort Sea for a period of 5 years (2011–2016). The request was submitted on April 22, 2009, by the Alaska Oil and Gas Association (AOGA) on behalf of its members and other participating parties. The petition is available at *http://www.regulations.gov.*

AOGA's application indicates that they request regulations that will be applicable to any company conducting oil and gas exploration, development, and production activities as described within the request. This includes members of AOGA and other parties planning to conduct oil and gas operations in the geographic region. Members of AOGA represented in the petition include:

- Alyeska Pipeline Service Company;
- Anadarko Petroleum Corporation;
- BP Exploration (Alaska) Inc.;
- Chevron USA, Inc.;
- Eni Petroleum;
- ExxonMobil Production Company;
- Flint Hills Resources, Inc.;
- Marathon Oil Company;
- Pacific Energy Resources Ltd.;
- Petro-Canada (Alaska) Inc.;
- Petro Star Inc.;
- Pioneer Natural Resources Alaska, Inc.;
- Shell Exploration & Production Company;
- Statoil Hydro;
- Tesoro Alaska Company; and
- XTO Energy, Inc.

Other participating parties include ConocoPhillips Alaska, Inc. (CPAI), CGG Veritas, Brooks Range Petroleum Corporation (BRPC), and Arctic Slope Regional Corporation (ASRC) Energy Services. The activities and geographic region specified in AOGA's request, and considered in these regulations, are described in the ensuing sections titled ''Description of Geographic Region'' and ''Description of Activities.''

Prior to issuing regulations at 50 CFR part 18, subpart J, in response to this request, we must evaluate the level of industrial activities, their associated potential impacts to polar bears and Pacific walruses, and their effects on the availability of these species for subsistence use. The information provided by the petitioners indicates that projected oil and gas activities over this timeframe will encompass onshore and offshore exploration, development, and production activities. The petitioners have also specifically requested that these regulations be issued for nonlethal take. Industry has indicated that, through implementation of the mitigation measures, it is confident a lethal take will not occur. The Service is tasked with analyzing the impact that lawful oil and gas industry activities will have on polar bears and walruses during normal operating procedures. In addition, the potential for impact by the oil and gas industry outside normal operating conditions warrant an analysis of the risk of an oil spill and its potential impact on polar bears and walruses.

Description of Regulations

The regulations include: permissible methods of nonlethal taking; measures to ensure the least practicable adverse impact on the species and the availability of these species for subsistence uses; and requirements for monitoring and reporting. These regulations do not authorize, or ''permit,'' the actual activities associated with oil and gas exploration, development, and production. Rather, they authorize the nonlethal incidental, unintentional take of small numbers of polar bears and Pacific walruses associated with those activities based on standards set forth in the MMPA. The Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), the U.S. Army Corps of Engineers, and the Bureau of Land Management (BLM) are responsible for permitting activities associated with oil and gas activities in Federal waters and on Federal lands. The State of Alaska is responsible for permitting activities on State lands and in State waters.

Under these nonlethal incidental take regulations, persons seeking taking authorization for particular projects will apply for an LOA to cover nonlethal take associated with exploration, development, or production activities pursuant to the regulations. Each group or individual conducting an oil and gas industry-related activity within the area covered by these regulations may request an LOA. A separate LOA is mandatory for each activity. We must receive applications for LOAs at least 90 days before the activity is to begin.

Applicants must submit a plan to monitor the effects of authorized activities on polar bears and walruses. Applicants must include in their LOA request the timeframe of proposed activities, the operating terms and conditions, a polar bear encounter and interaction plan, and a marine mammal monitoring plan.

Applicants must also include a Plan of Cooperation (POC) describing the availability of these species for subsistence use by Alaska Native communities and how they may be affected by Industry operations. The purpose of the POC is to ensure that oil and gas activities will not have an unmitigable adverse impact on the availability of the species or the stock for subsistence uses. The POC must provide the procedures on how Industry will work with the affected Native communities, including a description of the necessary actions that will be taken to: (1) Avoid or minimize interference with subsistence hunting of polar bears and Pacific walruses; and (2) ensure continued availability of the species for subsistence use. The POC is further described in ''Effects of Oil and Gas Industry Activities on Subsistence Uses of Marine Mammals.''

We will evaluate each request for an LOA based on the specific activity and specific location, and we may condition the LOA depending on specific circumstances for that activity and location. For example, an LOA issued in response to a request to conduct activities in areas with known, active bear dens or a history of polar bear denning may be conditioned to require one or more of the following: Forward Looking Infrared (FLIR) imagery flights to determine the location of active polar bear dens; avoiding all denning activity by 1 mile; intensified monitoring in a 1-mile buffer around the den; or avoiding the area during the denning period. More information on applying for and receiving an LOA can be found at 50 CFR 18.27(f).

Description of Geographic Region

The geographic area covered by the requested incidental take regulations (hereafter referred to as the Beaufort Sea Region) encompasses all Beaufort Sea waters east of a north-south line through Point Barrow (71°23′29″ N, -156°28′30″ W, BGN 1944), and up to 200 miles north of Point Barrow, including all Alaska State waters and Outer Continental Shelf waters, and east of that line to the Canadian border. The onshore region is the same north/south line at Barrow, 25 miles inland and east to the Canning River. The Arctic National Wildlife Refuge is not included in these regulations. The geographical extent of these regulations is similar to that in previous regulations (71 FR 43926; August 2, 2006), where the offshore boundary is the Beaufort Sea Planning area, approximately 200 miles offshore.

Description of Activities

Activities covered in these regulations include Industry exploration, development, and production operations of oil and gas reserves, as well as environmental monitoring associated with these activities, on the northern coast of Alaska. Throughout the 5 years that the future regulations will be in place, the petitioners expect that similar types of oil and gas activities will occur at similar times of the year as under the prior regulations. Examples of future Industry activities include the completion of the Alpine Satellite Development and development of Point Thomson, Oooguruk, Nikaitchuq, and areas in the National Petroleum Reserve—Alaska (NPR–A). According to the petitioners, the locations of these operations are anticipated to be approximately equally divided among the onshore and offshore tracts presently under lease and to be leased during the period under consideration.

For the purpose of assessing possible impacts, we anticipate, based on information provided by the petitioners, that these activities will occur equally spaced over time and area for the upcoming ice-covered and open-water seasons. Due to the large number of variables affecting Industry activities, predicting exact dates and locations of operation for the open-water and ice-covered seasons is not possible at this time. However, operators must provide specific dates and locations of proposed activities prior to receiving an LOA.

Industry-Proposed Activities Considered Under Incidental Take Regulations

Alaska's North Slope encompasses an area of 88,280 square miles and currently contains 11 oil and gas field units associated with Industry. These include the Greater Prudhoe Bay, Duck Island, Badami, Northstar, Kuparuk River, Colville River, Oooguruk, Tuvaq, Nikaitchuq, Milne Point, and Point Thomson. These units encompass exploration, development, and production activities. In addition, some of these fields include associated satellite oilfields: Sag Delta North, Eider, North Prudhoe Bay, Lisburne, Niakuk, Niakuk-Ivashak, Aurora, Midnight Sun, Borealis, West Beach, Polaris, Orion, Tarn, Tabasco, Palm, West Sak, Meltwater, Cascade, Schrader Bluff, Sag River, and Alpine.

Exploration Activities

As with previous regulations, exploration activities may occur onshore or offshore and include: geological surveys; geotechnical site investigations; reflective seismic exploration; vibrator seismic data collection; airgun and water gun seismic data collection; explosive seismic data collection; vertical seismic profiles; sub-sea sediment sampling; construction and use of drilling structures such as caisson-retained islands, ice islands, bottom-founded structures [steel drilling caisson (SDC)], ice pads and ice roads; oil spill prevention, response, and cleanup; and site restoration and remediation. Exploration activities could also include the development of staging facilities. The level of exploration activities is expected to be similar to the level during the past regulatory periods, although exploration projects may shift to different locations, particularly the National Petroleum Reserve—Alaska (NPR–A).

The location of new exploration activities within the geographic region of the rule will, in part, be determined by the following State and Federal oil and gas lease sales:

State of Alaska Lease Sales

In 1996, the State of Alaska Department of Natural Resources (ADNR), Oil and Gas Division, adopted an ''area wide'' approach to leasing. Under area-wide leasing, the State offers all available State acreage not currently under lease within each area annually. The area of activity in this petition includes the North Slope and Beaufort Sea planning areas. Lease sale data are available on the ADNR Web site at: http://www.dog.dnr.state.ak.us/oil/index.htm. ndustry activities may occur on State lease sales during the time period of the requested action. North Slope Area-wide lease sales are held annually in October. As of August 2008, there are 774 active leases on the North Slope, encompassing 971,245 hectares (2.4 million acres), and 224 active leases in the State waters of the Beaufort Sea, encompassing 249,000 hectares (615,296 acres). The sale on October 22, 2008, resulted in the sale of 60 tracts for a total of 86,765 hectares (214,400 acres). Eight lease sales have been held to date. As of July 2008, there are 38 active leases in the Beaufort Sea area, encompassing 38,333 hectares (94,724 acres). The sale on October 22, 2008, resulted in the sale of 32 tracts for a total of 40,145 hectares (99,200 acres).

Northwest and Northeast Planning Areas of NPR–A

The BLM manages more than 9 million hectares (23 million acres) in the NPR–A, including the Northwest (3.5 million hectares, 8.8 million acres), Northeast (1.8 hectares, 4.6 million acres), and South (3.6 million hectares, 9 million acres) Planning Areas. The area of activity in this petition includes the Northwest and Northeast areas.

Oil and gas lease sales were held in 2004, 2006, 2008, and 2010. The 2004 lease sale sold 123 tracts totaling 566,560 hectares (1.4 million acres); the 2006 sale sold 81 tracts covering 380,350 hectares (939,867 acres); the 2008 sale sold 23 tracts covering 106,013 hectares (261,964 acres); and the 2010 sale sold 5 tracts covering 11.511 hectares (28,444 acres). From 2000 to 2008, 25 exploratory wells were drilled in the Northeast and Northwest planning areas of the NPR–A. Current operator/ownership information is available on the BLM NPR–A Web site at *http://www.blm.gov/ak/st/en/prog/energy/oil_gas/npra.html.* Exploration activities were conducted on the FEX LP company leases in the Northwest Planning Area between 2006–2008. Exploration may continue where new areas have been selected. New project elements included exploration drilling at nine new ice drill pad locations (in the Uugaq, Aklaq, Aklaqyaaq, and Amaguq prospects), 99 km (62 mi) of new access corridor, and 34 new water sources.

In the Northeast Planning Area, CPAI applied for permits to begin a 5-year (2006–2011) winter drilling program at 11 sites (Noatak, Nugget, Cassin and Spark DD prospects), including 177 km (110 mi) of new right-of-way corridors and 10 new water supply lakes. CPAI is planning to continue developing its program in the Northeast Planning Area

throughout the duration of the requested regulations.

Outer Continental Shelf Lease Sales

The BOEMRE manages the Alaska Outer Continental Shelf (OCS) region encompassing 242 million hectares (600 million acres). In February 2003, the Minerals Management Service (MMS) (now known as the Bureau of Ocean Energy Management, Regulation, and Enforcement or BOEMRE) issued the Final Environmental Impact Statement (EIS) for three lease sales planned for the Beaufort Sea Planning Area: Sale 186, 195, and 202. Sale 186 was held in 2003, resulting in the leasing of 34 tracts encompassing 73,576 hectares (181,810 acres). Sale 195 was held in 2005, resulting in the leasing of 117 tracts encompassing 245,760 hectares (607,285 acres). Sale 202 was held in 2007, resulting in the leasing of 90 tracts covering 198,580 hectares (490,700 acres). Leasing information from BOEMRE is located at *http://www.boemre.gov/alaska/lease/lease.htm*. The next lease sale, Lease Sale 217, is planned for 2011. BOEMRE has begun preparing the multiple-sale EIS for these areas. The Draft EIS was released in November 2008 and is located at *http://www.BOEMRE.gov/alaska/ref/EIS%20EA/ArcticMultiSale_209/_DEIS.htm*. While the disposition of the leases is highly speculative at this time, it is probable that at least some seismic exploration and possibly some exploratory drilling will take place during the 5-year period of the regulations.

Exploratory drilling for oil occurs onshore, in inland areas, or in the offshore environment. Exploratory drilling and associated support activities and features may include: transportation to site; setup and relocation of up to 100-person camps and support camps (lights, generators, snow removal, water plants, wastewater plants, dining halls, sleeping quarters, mechanical shops, fuel storage, landing strips, aircraft support, health and safety facilities, data recording facilities and communication equipment); building gravel pads; building gravel islands with sandbag and concrete block protection; ice islands; ice roads; gravel hauling; gravel mine sites; road building; pipelines; electrical lines; water lines; road maintenance; buildings and facilities; operating heavy equipment; digging trenches; burying and covering pipelines; sea lift; water flood; security operations; dredging; moving floating drill units; helicopter support; and drill ships such as the Steel Drilling Caisson (SDC), CANMAR Explorer III, and the Kulluk.

During the regulatory period, exploration activities are anticipated to occur in the offshore environment and continue in the current oil field units, including those projects identified by Industry below.

Point Thomson

The Point Thomson reservoir is approximately 32 km (20 mi) east of the Badami field. In January 2009, ADNR issued a conditional interim decision that allows for the drilling of two wells by 2010 and the commencement of production by 2014. Following startup of production from Point Thomson in 2014, field development is expected to include additional liquids production and sale of gas. Field development will require additional wells, field facilities, and pipelines. The timing and nature of additional facilities and expansions will depend upon initial field performance and timing of an Alaska gas pipeline to export gas off the North Slope.

Ataruq (Two Bits)

The Ataruq project is permitted for construction but, not completely permitted for operation. This Kerr-McGee Oil and Gas Corporation project is located about 7.2 km (4.5 mi) northwest of the Kuparuk River Unit (KRU) Drill Site 2M. The area consists of two onshore prospects and covers about 2,071 hectares (5,120 acres). It includes a 6.4-km (4-mi) gravel road and a single gravel pad with production facilities and up to 20 wells in secondary containment modules. The processed fluids will be transported to DS 2M via a pipe-in-a-pipe buried line within the access road. After drilling, the facility will be normally unmanned.

Shell Offshore Exploration Activities

Shell anticipates conducting an exploration drilling program, called the Suvulliq Project, on BOEMRE Alaska OCS leases located in the Beaufort Sea during the arctic drilling seasons of 2011–2016. Presently, the arctic drilling seasons are generally considered to be from July through October in the Beaufort Sea. Shell will use a floating drilling vessel complemented by ice management and oil spill response (OSR) barges and/or vessels to accomplish exploration and/or delineation drilling during each arctic drilling season. An open water program in support of the development of Shell's Beaufort Sea leases will involve a site clearance and shallow hazards study as well. A detailed description of an offshore drilling activity of this nature can be found at: *http://alaska.fws.gov/fisheries/mmm/itr.htm*, under ''LOA Applications for Public viewing.''

ION Seismic Activity

ION is planning an open-water seismic program in the late open-water and into the ice-covered season, which will consist of an estimated 3,000 miles of 2D seismic line acquisition and site clearance surveys in the eastern Beaufort Sea. The open-water seismic program will consist of two vessels, one active in seismic acquisition and the second providing logistical support and ice breaking capabilities. An offshore open-water seismic program is proposed to occur between September through October 2011.

Development Activities

Development activities associated with oil and gas Industry operations include: road construction; pipeline construction; waterline construction; gravel pad construction; camp construction (personnel, dining, lodging, maintenance, water production, wastewater treatment); transportation (automobile, airplane, and helicopter); runway construction; installation of electronic equipment; well drilling; drill rig transport; personnel support; and demobilization, restoration, and remediation.

Alpine Satellites Development

CPAI has proposed to develop oil and gas from five satellites. Two proposed satellites known as CD–3 (CD North during exploration) and CD–4 (CD South) are in the Colville Delta. The CD–3 drill site is located north of CD–1 (Alpine facility) and is a roadless development accessed by a gravel airstrip or ice road in winter. The CD–4 drill site is connected to the main production pad via a gravel road. Production startup of CD–3 and CD–4 drill sites occurred in late summer 2006. Three other proposed satellites known as CD–5, CD–6, and CD–7 (Alpine West, Lookout, and Spark, respectively, during exploration) are in the NPR–A. Construction of the three NPR–A drill sites is anticipated during the ITR period. These remaining three drill sites are proposed to be connected to CD–2 via road and bridge over the Niglilq Channel from CD–5. The other two drill sites are planned to be connected to CD– via road; however, the permitting for these scenarios has not been completed. Development of five drill sites is planned by CPAI in the immediate future in the Alpine development area and could occur within the regulatory period. Production for CD–5, CD–6, and CD–7 are scheduled for 2015, 2016, and 2017, respectively.

Liberty

BPXA is currently in the process of developing the Liberty field, where the use of ultra extended-reach drilling (uERD) technology will access an offshore reservoir from existing onshore facilities. The Liberty reservoir is located in Federal waters in Foggy Island Bay about 13 km (8 mi) east of the Endicott Satellite Drilling Island (SDI). Liberty prospect is located approximately 5.5 miles offshore in 20 ft of water. The development of Liberty was first proposed in 1998 when BPXA submitted a plan to BOEMRE (then MMS) for a production facility on an artificial island in Foggy Island Bay. In 2002, BPXA put the project on hold to review project design and economics after the completion of BPXA's Northstar project. In August 2005, BPXA moved the project onshore to take advantage of advances in extended reach drilling. Liberty wells will extend as much as 8 miles offshore. Drilling of the initial Liberty development well and first oil production is planned to occur during the 5-year period of this rule.

North Shore Development

Brooks Range Petroleum Company (BRPC) is proposing the North Shore Development Project to produce oil from several relatively small, isolated hydrocarbon accumulations on the North Slope. The fields are close to existing Prudhoe Bay infrastructure, where production will concentrate on the Ivishak and Sag River sands prospects. Horizontal drilling technology and long-reach wells will be used to maximize production while minimizing surface impacts. BRPC expects to recover between five and ten million barrels of oil, and future exploration success could increase the reserves.

Potential Gas Pipeline

One company is currently proposing to construct a natural gas pipeline that would transport natural gas from the North Slope to North American markets. Only a small portion (40 km [25 mi] inland) of a pipeline would occur within the specified area of activity covered under this petition. Initial stages of the gas pipeline development, such as environmental studies and route selection, could occur during the 5-year period of the requested action.

The project is proposed by the TransCanada Corporation. The Alaska Gasline Inducement Act (AGIA) was passed into law by the State of Alaska in May 2007. TransCanada Corporation was selected by the State of Alaska in August 2008 as the exclusive recipient of the AGIA license. TransCanada Corporation is currently in the planning stages of developing the Alaska Pipeline Project, which will move natural gas from Alaska to North American markets. The project is planned to stretch approximately 2,760 km (1,715 mi) from Prudhoe Bay to the British Columbia/Alberta border near Boundary Lake. The Alaska Pipeline Project also includes a gas treatment plant in the Prudhoe Bay area with associated construction activities including dock/causeway improvements and barge channel dredging.

Nikaitchuq Unit

The Nikaitchuq Unit is located near Spy Island, north of Oliktok Point and the Kuparuk River Unit, and northwest of the Milne Point Unit. Former operator Kerr-McGee Oil and Gas Corporation drilled three exploratory wells on and immediately adjacent to Spy Island, 4 miles north of Oliktok Point in the ice-covered season of 2004–2005. The current operator, Eni, is moving to develop this site as a future production area. Future drilling will be from a small gravel island shoreward of the barrier islands. Additional operations will include approximately 13 miles of underground pipeline connecting the offshore sites to a mainland landfall and onshore facilities pad near Oliktok Point.

Production Activities

Existing North Slope production operations extend from the oilfield units of Alpine in the west to Point Thomson and Badami in the east. Badami and Alpine are developments without permanent access roads; access is available to these fields by airstrips, barges, and seasonal ice roads. Oil pipelines extend from these fields and connect to the Trans-Alaska Pipeline System (TAPS). North Slope oilfield developments include a series of major fields and their associated satellite fields. In some cases a new oilfield discovery has been developed completely using existing infrastructure. Thus, the Prudhoe Bay oilfield unit encompasses the Prudhoe Bay, Lisburne, Niakuk, West Beach, North Prudhoe Bay, Point McIntyre, Borealis, Midnight Sun, Polaris, Aurora, and Orion reservoirs, while the Kuparuk oilfield development incorporates the Kuparuk, West Sak, Tarn, Palm, Tabasco, and Meltwater oilfields.

Production activities include: personnel transportation (automobiles, airplanes, helicopters, boats, rolligons, cat trains, and snowmobiles); and unit operations (building operations, oil production, oil transport, restoration, remediation, and improvement of oilfield operations). Production activities are permanent, year-round activities, whereas exploration and development activities are usually temporary and seasonal.

Only production units and facilities operated by BP Exploration Alaska, Inc. and ConocoPhillips Alaska, Inc. have been covered under previous incidental take regulations (Greater Prudhoe Bay, Endicott, Milne Point, Badami, Northstar, Kuparuk River, and Alpine, respectively). Now the Oooguruk field, operated by Pioneer, is currently producing as well.

Prudhoe Bay Unit

The Prudhoe Bay oilfield is the largest oilfield by production in North America and ranks among the 20 largest oilfields ever discovered worldwide. More than 11 billion barrels have been produced from a field originally estimated to have 25 billion barrels of oil in place. The Prudhoe Bay field also contains an estimated 26 trillion cubic ft of recoverable natural gas. More than 1,100 wells are currently in operation in the greater Prudhoe Bay oilfields, just over 900 of which are producing oil (others are for gas or water injection).

The total development area in the Prudhoe Bay Unit is approximately 2,785 hectares (6,883 acres). The Base Operations Center on the western side of the Prudhoe Bay oilfield can accommodate 476 people, the nearby Main Construction Camp can accommodate up to 680 people, and the Prudhoe Bay Operations Center on the eastern side of the field houses up to 488 people. Additional contract or construction personnel can be housed at facilities in nearby Deadhorse or in temporary camps placed on existing gravel pads.

Kuparuk River Unit

The Kuparuk oilfield is the second-largest producing oilfield in North America. More than 2.6 billion barrels of oil are expected to be produced from this oilfield. The Greater Kuparuk Area includes the satellite oilfields of Tarn, Palm, Tabasco, West Sak, and Meltwater. These satellite fields have been developed using existing facilities. To date, nearly 900 wells have been drilled in the Greater Kuparuk Area. The total development area in the Greater Kuparuk Area is approximately 603 hectares (1,508 acres), including 167 km (104 mi) of gravel roads, 231 km (144 mi) of pipelines, 6 gravel mine sites, and over 50 gravel pads.

The Kuparuk Operations Center and Kuparuk Construction Camp are able to accommodate up to 1,200 people. The

Kuparuk Industrial Center is primarily used for personnel overflow during the winter in years with a large amount of construction.

Greater Point McIntyre

The Greater Point McIntyre Area encompasses the Point McIntyre field and nearby satellite fields of West Beach, North Prudhoe Bay, Niakuk, and Western Niakuk. The Point McIntyre area is located 11.3 km (7 mi) north of Prudhoe Bay. It was discovered in 1988 and came online in 1993. BPXA produces the Point McIntyre area from two drill site gravel pads. The field's production peaked in 1996 at 170,000 barrels per day, whereas in 2006 production averaged 21,000 barrels per day with just over 100 wells in operation. Cumulative oil production as of December 31, 2006, was 738 million barrels of oil equivalent.

Milne Point

Located approximately 56 km (35 mi) northwest of Prudhoe Bay, the Milne Point oilfield was discovered in 1969 and began production in 1985. The field consists of more than 220 wells drilled from 12 gravel pads. Milne Point produces from three main fields: Kuparuk, Schrader Bluff, and Sag River. Cumulative oil production as of December 31, 2006, was 248 million barrels of oil equivalent. The total area of Milne Point and its satellites is 94.4 hectares (236 acres) of tundra, including 31 km (19 mi) of gravel roads, 64 km (40 mi) of pipelines, and one gravel mine site. The Milne Point Operations Center has accommodations for up to 300 people. It is estimated that the Ugnu reservoir contains roughly 20 billion barrels of heavy oil in place. BPXA's reservoir scientists and engineers conservatively estimate that roughly 10 percent of that resource, or 2 billion barrels, could be recoverable. Currently, cold heavy oil production with sand (CHOPS) technology is being tested at Milne South Pad. CHOPS is part of a multiyear technology testing and research program initiated at Milne Point in 2007.

Endicott

The Endicott oilfield is located approximately 16 km (10 mi) northeast of Prudhoe Bay. It is the first continuously producing offshore field in the U.S. arctic. The Endicott oilfield was developed from two manmade gravel islands connected to the mainland by a gravel causeway. The operations center and processing facilities are located on the 18-hectare (45-acre) Main Production Island. Approximately 80 wells have been drilled to develop the field. Two satellite fields drilled from Endicott's Main Production Island access oil from the Ivishak formation: Eider produces about 110 barrels per day, and Sag Delta North produces about 117 barrels per day. The total area of Endicott development is 156.8 hectares (392 acres) of land with 25 km (15 mi) of roads, 47 km (29 mi) of pipelines, and one gravel mine site. Approximately 100 people are housed at the Endicott Operations Center.

Badami

Production began from the Badami oilfield in 1998, but has not been continuous. The Badami field is located approximately 56 km (35 mi) east of Prudhoe Bay and is currently the most easterly oilfield development on the North Slope. The Badami development area is approximately 34 hectares (85 acres) of tundra including 7 km (4.5 mi) of gravel roads, 56 km (35 mi) of pipeline, one gravel mine site, and two gravel pads with a total of eight wells. There is no permanent road connection from Badami to Prudhoe Bay. The pipeline connecting the Badami oilfield to the common carrier pipeline system at Endicott was built from an ice road. The cumulative production is five million barrels of oil equivalent. This field is currently in ''warm storage'' status, *i.e.,* site personnel are minimized and the facility is maintained at a minimal level. Additionally, it currently is not producing oil reserves at this time. BPXA recently entered into an agreement with Savant LLC; under this agreement Savant will drill an exploration well in the winter of 2009 and potentially add an additional well in 2010. Depending on the outcome of these drilling programs, Badami could resume production.

Alpine

Discovered in 1996, the Alpine oilfield began production in November 2000. Alpine is the westernmost oilfield on the North Slope, located 50 km (31 mi) west of the Kuparuk oilfield and 14 km (9 mi) northeast of the village of Nuiqsut. Although the Alpine reservoir covers 50,264 hectares (124,204 acres), it has been developed from 65.9 hectares (162.92 acres) of pads and associated roads. Alpine features a combined production pad/drill site and three additional drill sites with an estimated 172 wells. There is no permanent road connecting Alpine with the Kuparuk oilfield; small aircraft are used to provide supplies and crew changeovers. Major resupply activities occur in the winter, using the ice road that is constructed annually between the two fields. The Alpine base camp can house approximately 540 employees.

Northstar

The Northstar oilfield was discovered in 1983 and developed by BPXA in 1995. The offshore oilfield is located 6 km (4 mi) northwest of the Point McIntyre field and 10 km (6 mi) from Prudhoe Bay in about 39 feet of water. The 15,360-hectare (38,400-acre) reservoir has now been developed from a 2-hectare (5-acre) artificial island. Production from the Northstar reservoir began in late 2001. The 2-hectare (5-acre) island will eventually contain 19 producing wells, six gas injector wells, and one solids injection well. A subsea pipeline connects facilities to the Prudhoe Bay oilfield. Access to Northstar is via helicopter, hovercraft, and boat.

Oooguruk Unit

The Oooguruk Unit is located adjacent to and immediately northwest of the Kuparuk River Unit in shallow waters of the Beaufort Sea, near Thetis Island. Unit production began in 2008. Facilities include an offshore drill site and onshore production facilities pad. In addition, a subsea 5.7-mile flowline transports produced fluids from the offshore drill site to shore, where it transitions to an aboveground flowline supported on vertical support members for 3.9 km (2.4 mi) to the onshore facilities for approximately 3.3 hectares (8.2 acres). The offshore drill site (2.4 hectares, 6 acres) is planned to support 48 wells drilled from the Nuiqsut and Kuparuk reservoirs. The wells are contained in well bay modules, with capacity for an additional 12 wells, if needed. Pioneer is additionally proposing production facilities west of KRU drill site 3S on State oil and gas leases. The contemplated facilities consist of two drill sites near the Colville River delta mouth, a tie-in pad adjacent to DS–3S, gravel roads, flow lines, and power lines. Drilling of the initial appraisal well is planned to start in 2013, with first oil production as early as 2015.

During the time period of the previous ITRs (2006–2011), three development projects were described as possibly moving into the production phase. Currently, only Oooguruk is producing. The two other developments, Nikaitchuq and the Alpine West Development, have not begun to produce oil to their fullest capacity. Concurrently, there are two additional developments that could be producing oil during the regulatory period. They are the Liberty and North Shore developments.

Proposed production activities will increase the total area of the Industrial footprint by the addition of new facilities, such as drill pads, pipelines, and support facilities, in the geographic region; however, oil production volume is expected to continue to decrease during this 5-year regulatory period, despite new fields initiating production. This is due to current producing fields reducing output and new fields not maintaining the loss of that output. Current monitoring and mitigation measures, described later, will be kept in place.

Evaluation of the Nature and Level of Activities

During the period covered by the regulations, we anticipate the annual level of activity at existing production facilities, as well as levels of new annual exploration and development activities, will be similar to that which occurred under the previous regulations, although exploration and development may shift to different locations, and new production facilities will add to the overall Industry footprint. Additional onshore and offshore production facilities are being considered within the timeframe of these regulations, potentially adding to the total permanent activities in the area. The progress is similar to prior production schedules, but there is a potential increase in the accumulation of the industrial footprint, with an increase mainly in onshore facilities.

Biological Information

Pacific Walrus

The Pacific walrus (*Odobenus rosmarus divergens*), is represented by a single population of animals inhabiting the shallow continental shelf waters of the Bering and Chukchi seas. The distribution of Pacific walruses varies markedly with seasons. During the late-winter breeding season, walruses are found in areas of the Bering Sea where open leads (linear openings or cracks in the sea ice), polynyas (areas of open sea surrounded by sea ice), or areas of broken pack ice occur. Significant winter concentrations are normally found in the Gulf of Anadyr, the St. Lawrence Island Polynya, and in an area south of Nunivak Island. In the spring and early summer, most of the population follows the retreating pack ice northward into the Chukchi Sea; however, several thousand animals, primarily adult males, remain in the Bering Sea, utilizing coastal haulouts during the ice-free season. During the summer months, walruses are widely distributed across the shallow continental shelf waters of the Chukchi Sea. Significant summer concentrations are normally found in the unconsolidated pack ice west of Point Barrow, and along the northern coastline of Chukotka, Russia, in the vicinity of Wrangell Island. Small herds of walruses occasionally range east of Point Barrow into the Beaufort Sea in late summer. As the ice edge advances southward in the fall, walruses reverse their migration and re-group on the Bering Sea pack ice.

Population Status

The size of the Pacific walrus population has never been known with certainty. Based on large sustained harvests in the 18th and 19th centuries, Fay (1957) speculated that the pre-exploitation population was represented by a minimum of 200,000 animals. Since that time, population size is believed to have fluctuated markedly in response to varying levels of human exploitation. Large-scale commercial harvests are believed to have reduced the population to 50,000–100,000 animals in the mid-1950s (Fay *et al.* 1989). The population appears to have increased rapidly in size during the 1960s and 1970s in response to harvest regulations and reductions in hunting pressure (Fay *et al.* 1989). Between 1975 and 1990, visual aerial surveys were carried out by the United States and Russia at 5-year intervals, producing population estimates ranging from 201,039 to 290,000 walruses. In 2006, U.S. and Russian researchers surveyed walrus groups in the pack ice of the Bering Sea using thermal imaging systems to detect walruses hauled out on sea ice and satellite transmitters to account for walruses in the water. The number of walruses within the surveyed area was estimated at 129,000, with 95 percent confidence limits of 55,000 to 507,000 individuals. Previous aerial survey results are highly variable and not directly comparable among years because of differences in survey methods, timing of surveys, segments of the population surveyed, and incomplete coverage of areas where walrus may have been present. Because of such issues, existing abundance estimates do not provide a basis for determining trends in population size.

Changes in walrus population status have also been investigated by examining changes in biological parameters over time. Based on evidence of changes in abundance, distribution, condition indices, and life-history parameters, Fay *et al.* (1989) and Fay *et al.* (1997) concluded that the Pacific walrus population increased greatly in size during the 1960s and 1970s and postulated that the population was approaching, or had exceeded, the carrying capacity of its environment by the early 1980s. Harvest increased in the 1980s. Changes in the size, composition, and productivity of the sampled walrus harvest in the Bering Strait Region of Alaska over this timeframe are consistent with this hypothesis (Garlich-Miller *et al.* 2006). Harvest levels declined sharply in the early 1990s, and increased reproductive rates and earlier maturation in females occurred, suggesting that density-dependent feedback mechanisms had been relaxed and the population had likely dropped below carrying capacity (Garlich-Miller *et al.* 2006). However, it is unknown whether density-dependent changes in life-history parameters were mediated by changes in population abundance or changes in the carrying capacity of the environment (Garlich-Miller *et al.* 2006).

Habitat

Walruses rely on floating pack ice as a substrate for resting and giving birth. Walruses generally require ice thicknesses of 50 cm (20 in) or more to support their weight. Although walruses can break through ice up to 20 cm (8 in) thick, they usually occupy areas with natural openings and are not found in areas of extensive, unbroken ice (Fay 1982). Thus, their concentrations in winter tend to be in areas of divergent ice flow or along the margins of persistent polynyas. Concentrations in summer tend to be in areas of unconsolidated pack ice, usually within 100 km (30 mi) of the leading edge of the ice pack (Gilbert 1999). When suitable pack ice is not available, walruses haul out to rest on land. Isolated sites, such as barrier islands, points, and headlands, are most frequently occupied. Social factors, learned behavior, and proximity to their prey base are also thought to influence the location of haulout sites. Traditional walrus haulout sites in the eastern Chukchi Sea include Cape Thompson, Cape Lisburne, and Icy Cape. In recent years, the Cape Lisburne haulout site has seen regular use in late summer. Numerous haulouts also exist along the northern coastline of Chukotka, and on Wrangell and Herald islands, which are considered important haul-out areas in September, especially in years when the pack ice retreats far to the north.

Although capable of diving to deeper depths, walruses are generally found in shallow waters of 100 m (300 ft) or less, possibly because of higher productivity of their benthic foods in shallower water. They feed almost exclusively on benthic invertebrates, although Native

hunters have also reported incidents of walruses preying on seals. Prey densities are thought to vary across the continental shelf according to sediment type and structure. Preferred feeding areas are typically composed of sediments of soft, fine sands. The juxtaposition of ice over appropriate depths for feeding is especially important for females and their dependent young that are not capable of deep diving or long exposure in the water. The mobility of the pack ice is thought to help prevent walruses from overexploiting their prey resource (Ray *et al.* 2006). Foraging trips may last for several days, during which time they dive to the bottom nearly continuously. Most foraging dives to the bottom last between 5 and 10 minutes, with a relatively short (1–2 minute) surface interval. The intensive tilling of the sea floor by foraging walruses is thought to have significant influence on the ecology of the Bering and Chukchi seas. Foraging activity recycles large quantities of nutrients from the sea floor back into the water column, provides food for scavenger organisms, and contributes greatly to the diversity of the benthic community.

Life History

Walruses are long-lived animals with low rates of reproduction. Females reach sexual maturity at 4–9 years of age. Males become fertile at 5–7 years of age; however, they are usually unable to compete for mates until they reach full physical maturity at 15–16 years of age. Breeding occurs between January and March in the pack ice of the Bering Sea. Calves are usually born in late April or May the following year during the northward migration from the Bering Sea to the Chukchi Sea. Calving areas in the Chukchi Sea extend from the Bering Strait to latitude 70 °N. (Fay *et al.* 1984). Calves are capable of entering the water shortly after birth, but tend to haul out frequently until their swimming ability and blubber layer are well developed. Newborn calves are tended closely. They accompany their mother from birth and are usually not weaned for 2 years or more. Cows brood newborns to aid in their thermoregulation (Fay and Ray 1968) and carry them on their back or under their flipper while in the water (Gehnrich 1984). Females with newborns often join together to form large ''nursery herds'' (Burns 1970). Summer distribution of females and young walruses is closely tied to the movements of the pack ice relative to feeding areas. Females give birth to one calf every two or more years. This reproductive rate is much lower than other pinniped species; however, some walruses live to age 35–40 and remain reproductively active until relatively late in life.

Walruses are extremely social and gregarious animals. They tend to travel in groups and haul out onto ice or land in groups. Walruses spend approximately one-third of their time hauled out onto land or ice. Hauled-out walruses tend to lie in close physical contact with each other. Youngsters often lie on top of the adults. The size of the hauled out groups can range from a few animals up to several thousand individuals.

Mortality

Polar bears are known to prey on walrus calves, and killer whales (*Orcinus orca*) have been known to take all age classes of walruses (Frost *et al.* 1992, Melnikov and Zagrebin 2005). Predation levels are thought to be highest near terrestrial haulout sites where large aggregations of walruses can be found; however, few observations exist for off-shore environs.

Pacific walruses have been hunted by coastal Natives in Alaska and Chukotka for thousands of years. Exploitation of the Pacific walrus population by Europeans has also occurred in varying degrees since first contact. Presently, walrus hunting in Alaska and Chukotka is restricted to meet the subsistence needs of aboriginal peoples. The Service, in partnership with the Eskimo Walrus Commission (EWC) and the Association of Traditional Marine Mammal Hunters of Chukotka, administered subsistence harvest monitoring programs in Alaska and Chukotka in 2000–2005. Harvest mortality over this timeframe averaged 5,458 walruses per year. This mortality estimate includes corrections for under-reported harvest and struck and lost animals.

Intra-specific trauma is also a known source of injury and mortality. Disturbance events can cause walruses to stampede into the water and have been known to result in injuries and mortalities. The risk of stampede-related injuries increases with the number of animals hauled out. Calves and young animals at the perimeter of these herds are particularly vulnerable to trampling injuries.

Distribution and Abundance of Pacific Walruses in the Beaufort Sea

The distribution of Pacific walruses is thought to be influenced primarily by the extent of the seasonal pack ice. In May and June, most of the Pacific walrus population migrates through the Bering Strait into the Chukchi Sea. Walruses tend to migrate into the Chukchi Sea along lead systems that develop along the northwest coast of Alaska. Walruses are expected to be closely associated with the southern edge of the seasonal pack ice during the open water season. By July, large groups of walruses, up to several thousand animals, can be found along the edge of the pack ice between Icy Cape and Point Barrow. During August, the edge of the pack ice generally retreats northward to about 71 °N, but in light ice years, the ice edge can retreat beyond 76 °N. The sea ice normally reaches its minimum (northern) extent in September. In years when the sea ice retreats beyond the relatively shallow continental shelf waters of the Chukchi Sea, some animals migrate west towards Chukotka, while others have been observed hauling out along the shoreline between Point Barrow and Cape Lisburne. In recent years, coastal haulouts in Chukotka have seen regular and persistent use in the fall. Russian biologists attribute the increased use of these coastal haulouts to diminishing sea ice habitat. A similar event was recorded along the Alaskan coastline in August–September 2007, 2009, and 2010, when several thousand animals were reported along the Chukchi Sea coast between Barrow and Cape Lisburne. The pack ice usually advances rapidly southward in October, and most walruses are thought to have moved into the Bering Sea by mid- to late-November.

Although most walruses remain in the Chukchi Sea throughout the summer months, small numbers of animals occasionally range into the Beaufort Sea in late summer. A total of 18 walrus sightings has been reported as a result of Industry monitoring efforts over the past 20 years (Kalxdorff and Bridges 2003, USFWS unpubl. data). Two sightings occurred in 1996; one involved a single animal observed from a seismic vessel near Point Barrow, and a second animal was sighted during an aerial survey approximately 5 miles northwest of Howe Island. In 1997, another single animal was sighted during an aerial survey approximately 20 miles north of Pingok Island. In 1998, a dead walrus was observed on Pingok Island being scavenged by polar bears. One walrus was observed hauled out near the SDC at McCovey in 2002. In 2004, one walrus was observed 50 m (164 ft) from the Saltwater Treatment Plant, on West Dock. In addition, walrus have been observed on the armor of Northstar Island three times since 2001; in 2004, three walrus were observed on the armor in two separate instances.

Between 2005 and 2009 additional walruses were recorded.

Climate Change

Analyses of long-term environmental data sets indicate that substantial reductions in both the extent and thickness of the arctic sea-ice cover have occurred over the past 40 years. Record minimum sea ice extent was recorded in 2002, 2005, and again in 2007; sea-ice cover in 2003 and 2004 was also substantially below the 20-year mean. Walruses rely on suitable sea ice as a substrate for resting between foraging bouts, calving, molting, isolation from predators, and protection from storm events. The juxtaposition of sea ice over shallow-shelf habitat suitable for benthic feeding is important to walruses. Recent trends in the Chukchi Sea have resulted in seasonal sea-ice retreat off the continental shelf and over deep Arctic Ocean waters, presenting significant adaptive challenges to walruses in the region. Reasonably foreseeable impacts to walruses as a result of diminishing sea ice cover include: shifts in range and abundance, such as hauling out on land and potential movements into the Beaufort Sea; increased vulnerability to predation and disturbance; declines in prey species; increased mortality rates resulting from storm events; and premature separation of females and dependent calves. Secondary effects on animal health and condition resulting from reductions in suitable foraging habitat may also influence survivorship and productivity. Future studies investigating walrus distributions, population status and trends, and habitat use patterns are important for responding to walrus conservation and management issues associated with environmental and habitat changes.

Polar Bear

The polar bear (*Ursus maritimus*) was listed as threatened, range-wide, under the Endangered Species Act (ESA) on May 15, 2008, due to loss of sea ice habitat caused by climate change (73 FR 28212). The Service published a final special rule under section 4(d) of the ESA for the polar bear on December 16, 2008 (73 FR 76249), which provides for measures that are necessary and advisable for the conservation of polar bears. This means that this special 4(d) rule: (a) In most instances, adopts the conservation regulatory requirements of the MMPA and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) for the polar bear as the appropriate regulatory provisions for the polar bear; (b) provides that incidental, nonlethal take of polar bears resulting from activities outside the bear's current range is not prohibited under the ESA; (c) clarifies that the special rule does not alter the Section 7 consultation requirements of the ESA; and (d) applies the standard ESA protections for threatened species when an activity is not covered by an MMPA or CITES authorization or exemption.

Polar bears occur throughout the arctic. In Alaska, they have been observed as far south in the eastern Bering Sea as St. Matthew Island and the Pribilof Islands (Ray 1971). However, they are most commonly found within 180 miles of the Alaskan coast of the Chukchi and Beaufort Seas, from the Bering Strait to the Canadian border. Two stocks occur in Alaska: (1) The Chukchi-Bering seas stock (CS); and (2) the Southern Beaufort Sea stock (SBS). A summary of the CS and SBS polar bear stocks are described below. A detailed description of the CS and SBS polar bear stocks can be found in the ''Range-Wide Status Review of the Polar Bear (*Ursus maritimus*)'' (*http://alaska.fws.gov/fisheries/mmm/polarbear/issues.htm*).

Management and conservation concerns for the SBS and CS polar bear populations include: Climate change, which continues to increase both the expanse and duration of open water in summer and fall; human activities within the near-shore environment, including oil and gas activities; atmospheric and oceanic transport of contaminants into the Arctic; and over-harvest, should polar bear stocks become nutritionally stressed or decline due to some combination of the aforementioned threats.

Southern Beaufort Sea (SBS)

The SBS polar bear population is shared between Canada and Alaska. Radio-telemetry data, combined with earlier tag returns from harvested bears, suggest that the SBS region comprised a single population with a western boundary near Icy Cape, Alaska, and an eastern boundary near Pearce Point, Northwest Territories, Canada. Early estimates from the mid-1980s suggested the size of the SBS population was approximately 1,800 polar bears, although uneven sampling was known to compromise the accuracy of that estimate. A population analysis of the SBS stock was completed in June 2006 through joint research coordinated between the United States and Canada. That analysis indicated the population of the region between Icy Cape and Pearce Point is now approximately 1,500 polar bears (95 percent confidence intervals approximately 1,000–2,000). Although the confidence intervals of the current population estimate overlap the previous population estimate of 1,800, other statistical and ecological evidence (*e.g.,* high recapture rates in the field) suggest that the current population is actually smaller than has been estimated for this area in the past.

Recent analyses of radio-telemetry data of spatio-temporal use patterns of bears of the SBS stock using new spatial modelling techniques suggest realignment of the boundaries of the SBS area. We now know that nearly all bears in the central coastal region of the Beaufort Sea are from the SBS population, and that proportional representation of SBS bears decreases to both the west and east. For example, only 50 percent of the bears occurring in Barrow, Alaska, and Tuktoyaktuk, Northwest Territories, are SBS bears, with the remainder being from the CS and Northern Beaufort Sea populations, respectively. The recent radio-telemetry data indicate that bears from the SBS population seldom reach Pearce Point, which is currently on the eastern management boundary for the SBS population. Conversely, SBS bears can also be found in the western regions of their range in the Chukchi Sea (*i.e.,* Wainwright and Point Lay) in lower proportions than the central portion of their range.

Additional threats evaluated during the listing included impacts from activities such as industrial operations, subsistence harvest, shipping, and tourism. No other impacts were considered significant in causing the decline, but minimizing effects from these activities could become increasingly important for conservation as polar bear numbers continue to diminish. More information can be found at: *http://www.fws.gov/* and *http://alaska.fws.gov/fisheries/mmm/polarbear/issues.htm.*

Chukchi/Bering Seas (CS)

The CS is defined as those polar bears inhabiting the area as far west as the eastern portion of the Eastern Siberian Sea, as far east as Point Barrow, and extending into the Bering Sea, with its southern boundary determined by the extent of annual ice. Based upon telemetry studies, the western boundary of the population has been set near Chaunskaya Bay in northeastern Russia. The eastern boundary is at Icy Cape, Alaska, which is also the previous western boundary of the SBS. This eastern boundary constitutes a large overlap zone with bears in the SBS population. The status of the CS population, which was believed to have increased after the level of harvest was

reduced in 1972, is now thought to be uncertain or declining. The most recent population estimate for the CS population is 2,000 animals. This was based on extrapolation of aerial den surveys from the early 1990s; however, this crude estimate is currently considered to be of little value for management. Reliable estimates of population size based upon mark and recapture are not available for this region, and measuring the population size remains a research challenge (Evans *et al.* 2003).

With the action of the Bilateral Commission under the *Bilateral Agreement on the Conservation and Management of the Alaska-Chukotka Polar Bear Population,* legal subsistence harvest for polar bears from the CS stock occurs in both Russia and in western Alaska, as long as this harvest does not affect the sustainability of the polar bear population. In Alaska, average annual harvest levels declined by approximately 50 percent between the 1980s and the 1990s and have remained at low levels in recent years. There are several factors potentially affecting the harvest level in western Alaska. The factor of greatest direct relevance is the substantial illegal harvest in Chukotka. In recent years a reportedly sizable illegal harvest has occurred in Russia, despite a ban on hunting that has been in place since 1956. In addition, other factors such as climate change and its effects on pack ice distribution, as well as changing demographics and hunting effort in native communities, could influence the declining take. The unknown rate of illegal take makes the stable designation uncertain and tentative.

Habitat

Polar bears evolved for life in the Arctic and are distributed throughout most ice-covered seas of the Northern Hemisphere. They are generally limited to areas where the sea is ice-covered for much of the year; however, polar bears are not evenly distributed throughout their range. They are most abundant near the shore in shallow-water areas, and in other areas where currents and ocean upwelling increase marine productivity and maintain some open water during the ice-covered season. Over most of their range, polar bears remain on the sea ice year-round or spend only short periods on land.

The Service designated critical habitat for polar bear populations in the United States effective January 6, 2011 (75 FR 76086; December 7, 2010). Critical habitat identifies geographic areas that contain features that are essential for the conservation of a threatened or endangered species and that may require special management or protection. The designation of critical habitat under the ESA does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. It does not allow government or public access to private lands. A critical habitat designation does not affect private lands unless Federal funds, permits, or activities are involved. Federal agencies that undertake, fund, or permit activities that may affect critical habitat are required to consult with the Service to ensure that such actions do not adversely modify or destroy critical habitat.

The Service's designation of critical habitat is divided into three areas or units: barrier island habitat, sea ice habitat (both described in geographic terms), and terrestrial denning habitat (a functional description). Barrier island habitat includes coastal barrier islands and spits along Alaska's coast and is used for denning, refuge from human disturbances, access to maternal dens and feeding habitat, and travel along the coast. Sea ice habitat is located over the continental shelf, and includes water 300 m (984 ft) and less in depth. Terrestrial denning habitat includes lands within 32 km (20 miles) of the northern coast of Alaska between the Canadian border and the Kavik River and within 8 km (5 miles) of the coastline between the Kavik River and Barrow. The total area designated covers approximately 484,734 square kilometers (187,157 square miles) and is entirely within the lands and waters of the United States. A detailed description of the critical habitat can be found online at *http://www.regulations.gov* at Docket No. FWS–R7–ES–2009–0042.

Denning and Reproduction

Female bears can be quite sensitive to disturbances during denning. Females can initiate breeding at 5 to 6 years of age. Females without dependent cubs breed in the spring. Pregnant females enter maternity dens by late November, and the young are usually born in late December or early January. Only pregnant females den for an extended period during the winter; other polar bears may excavate temporary dens to escape harsh winter winds. An average of two cubs is born. Reproductive potential (intrinsic rate of increase) is low. The average reproductive interval for a polar bear is 3 to 4 years, and a female polar bear can produce about 8 to 10 cubs in her lifetime; in healthy populations, 50 to 60 percent of the cubs will survive.

In late March or early April, the female and cubs emerge from the den. If the mother moves young cubs from the den before they can walk or withstand the cold, mortality to the cubs increases. Therefore, it is thought that successful denning, birthing, and rearing activities require a relatively undisturbed environment. Radio and satellite telemetry studies elsewhere indicate that denning can occur in multi-year pack ice and on land. Recent studies of the SBS indicate that the proportion of dens on pack ice have declined from approximately 60 percent in 1985–1994 to 40 percent in 1998–2004.

In northern Alaska, maternal polar bear dens appear to be less concentrated than in Canada to the east and in Russia to the west. In Alaska, certain areas, such as barrier islands (linear features of low-elevation land adjacent to the main coastline that are separated from the mainland by bodies of water), river bank drainages, much of the North slope coastal plain, and coastal bluffs that occur at the interface of mainland and marine habitat, receive proportionally greater use for denning than other areas. Maternal denning occurs on tundra-bearing barrier islands along the Beaufort Sea and also in the large river deltas, such as those associated with the Colville and Canning rivers.

A recent study showed that the proportion of polar bears denning in the SBS on pack ice, which requires a high level of sea-ice stability for successful denning, declined from 62 percent in 1985–1994 to 37 percent in 1998–2004 (Fischbach *et al.* 2007). The authors concluded that the denning distribution changed in response to reductions in stable old ice, increases in unconsolidated ice, and lengthening of the melt season. If sea-ice extent in the Arctic continues to decrease and the amount of unstable ice increases, a greater proportion of polar bears may seek to den on land (Durner *et al.* 2006, Fischbach *et al.,* 2007).

Prey

Ringed seals (*Pusa hispida*) are the primary prey of polar bears in most areas. Bearded seals (*Erignathus barbatus*) and walrus calves are hunted occasionally. Polar bears also opportunistically scavenge marine mammal carcasses, notably bowhead whale (*Balaena mysticetus*) carcasses at Point Barrow, and Cross and Barter islands, associated with the annual subsistence hunt in these communities. There are also anecdotal reports of polar bears killing beluga whales (*Delphinapterus leucas*) trapped in the ice, although the importance of beluga

as a food source is not known. Polar bears have also been observed consuming non-food items including Styrofoam, plastic, antifreeze, and hydraulic and lubricating fluids.

Polar bears use the sea ice as a platform to hunt seals. Polar bears often hunt seals along leads and other areas of open water. Polar bears also hunt seals at breathing holes, or by breaking through the roof of seal lairs. Lairs are excavated by seals in snow drifts on top of the ice. Bears also stalk seals in the spring when they haul out on the ice in warm weather. The relationship between ice type and polar bear distribution is as yet unknown, but it is suspected to be related to seal availability. Due to changing sea ice conditions, the area of open water and proportion of marginal ice has increased and extends later in the fall. This may limit seal availability to polar bears as the most productive areas for seals appear to be over the shallower waters of the continental shelf.

Mortality

Polar bears are long-lived (up to 30 years), have no natural predators, and do not appear prone to death by diseases or parasites. Cannibalism by adult males on cubs and occasionally on adult bears is known to occur. The most significant source of premature adult polar bear mortality is human activity. Before the MMPA was passed in 1972, polar bears were taken by sport hunters and residents. Between 1925 and 1972, the mean reported kill was 186 bears per year. Seventy-five percent of these were males, as cubs and females with cubs were protected. Since 1972, only Alaska Natives from coastal Alaskan villages have been allowed to hunt polar bears for their subsistence uses, for the manufacture of handicraft and clothing items. From 1980 to 2005, the total annual harvest for Alaska averaged 101 bears: 64 percent from the Chukchi Sea and 36 percent from the Beaufort Sea. Other sources of mortality related to human activities include bears killed during research activities, euthanasia of sick or injured bears, and defense-of-life kills by non-Natives (Brower *et al.* 2002).

Distribution and Abundance of Polar Bears in the Beaufort Sea

Polar bears are dependent upon the sea ice as a platform for foraging. The most productive locations seem to be areas near the ice edge, leads, or polynyas over the continental shelf (Durner *et al.* 2004). Polar bears can also be observed throughout the year in the onshore and nearshore environments, where they will opportunistically scavenge on marine mammal carcasses washed up along the shoreline (Kalxdorff and Fischbach 1998). Their distribution in the coastal habitat can be influenced by the movement of the seasonal pack ice.

More specifically, during the ice-covered season, pregnant females can use terrestrial denning habitat between late-October and mid-April. The percentage of pregnant females using terrestrial habitat for denning is unknown but, as stated earlier, the proportion of dens on terrestrial habitat has increased in recent years. In addition, a small proportion of bears of different cohorts may be found along the coastline as well during this time period. During the open water season (July through September), a small proportion of bears will utilize the coastal environments while the majority of the population will be on the ice edge of the pack ice.

During the late summer/fall period (August through October), polar bears are most likely to be encountered along the mainland coastline and barrier islands, using these features as travel corridors and hunting areas. Based on Industry observations, encounter rates are higher during the fall period (August to October) than any other time period. The duration the bears spend in these coastal habitats depends on storm events, ice conditions, and the formation of the annual ice. In recent years, polar bears have been observed in larger numbers than previously recorded during the fall period. The remains of subsistence-harvested bowhead whales at Cross and Barter Islands provide a readily available food source for the bears in these areas and appear to play a role in these numbers (Schliebe *et al.* 2006). Based on Industry observations and coastal survey data acquired by the Service, up to 125 individuals of the SBS bear population have been observed during the fall period between Barrow and the Alaska-Canada border.

Climate Change

Habitat loss due to changes in Arctic sea ice has been identified as the primary cause of decline in polar bear populations, and the decline of sea ice is expected to continue throughout the polar bear's range for the foreseeable future (73 FR 28212). In support of the listing, Amstrup *et al.* (2007) projected that if current sea ice declines continue, the sea-ice retreat may eventually exclude bears from onshore denning habitat in the Polar Basin Divergent Region, where they have projected a 42 percent loss of optimal summer polar bear habitat by 2050. SBS and CS polar bear populations inhabit this ecoregion, and Amstrup *et al.* (2007) have projected that these populations will be extirpated within the next 45–75 years if sea ice declines continue at current rates.

Climate change is likely to have serious consequences for the world-wide population of polar bears and their prey (ACIA 2004, Derocher *et al.* 2004, NRC 2003). Climate change is expected to impact polar bears in a variety of ways. The timing of ice formation and breakup will impact seal distributions and abundance, and, consequently, how efficiently polar bears can hunt seals. Reductions in sea ice are expected to increase the polar bears' energetic costs of traveling, as moving through fragmented sea ice and open water requires more energy than walking across consolidated sea ice.

Decreased sea ice extent may impact the reproductive success of denning polar bears. Polar bears require a stable substrate for denning. As ice conditions moderate, ice platforms become less stable, and coastal dens become vulnerable to erosion from storm surges. In the 1990s, approximately 50 percent of the maternal dens of the SBS polar bear population occurred annually on the pack ice rather than on terrestrial sites (Amstrup and Gardner 1994). Recently, the proportion of dens on pack ice declined from 62 percent in 1985–1994 to 37 percent in 1998–2004 (Fischbach *et al.* 2007). Terrestrial denning is expected to increase in the future, despite the threats of coastal erosion.

Due to the changing ice conditions, the Service anticipates that polar bear use of the Beaufort Sea coast will increase during the open-water season (June through October). Indeed, polar bear use of coastal areas during the fall open-water period has increased in recent years in the Beaufort Sea. This change in distribution has been correlated with the distance of the pack ice from the coast at that time of year (the farther from shore the leading edge of the pack ice is, the more bears are observed onshore) (Schliebe *et al.* 2006). Reductions in sea ice will result in increased distances between the ice edge and land, which will in turn lead to increasing numbers of bears coming ashore during the open-water period, or possibly drowning in an attempt to reach land. An increased number of bears on land may increase human-bear interactions or conflicts during this period.

Potential Effects of Oil and Gas Industry Activities on Subsistence Uses of Marine Mammals

Pacific walruses and polar bears have been traditionally harvested by Alaska Natives for subsistence purposes. The harvest of these species plays an important role in the culture and economy of many villages throughout coastal Alaska. Walrus meat is often consumed, and the ivory is used to manufacture traditional arts and crafts. Polar bears are primarily hunted for their fur, which is used to make cold weather gear; however, their meat is also consumed. Although walruses and polar bears are a part of the annual subsistence harvest of most rural communities on the North Slope of Alaska, these species are not as significant a food resource as bowhead whales, seals, caribou (*Rangifer tarandus*), and fish.

An exemption under section 101(b) of the MMPA allows Alaska Natives who reside in Alaska and dwell on the coast of the North Pacific Ocean or the Arctic Ocean to take polar bears and walruses if such taking is for subsistence purposes or for purposes of creating and selling authentic native articles of handicrafts and clothing, as long as the take is not done in a wasteful manner. Sport hunting of both species has been prohibited in the United States since enactment of the MMPA in 1972.

Pacific Walrus—Harvest Information

Few walruses are harvested in the Beaufort Sea along the northern coast of Alaska, as the primary range of Pacific walruses is west and south of the Beaufort Sea. Walruses constitute a small portion of the total marine mammal harvest for the village of Barrow. Hunters from Barrow have reported 477 walruses harvested in the past 20 years, 65 of those since 2005. Reports indicate that up to six animals, approximately 10 percent of the recorded harvest, were taken east of Point Barrow in the last 5 years within the geographical limits of the incidental take regulations. Hunters from Nuiqsut and Kaktovik do not normally hunt walruses unless the opportunity arises. They have reported taking only three walruses since the inception of the regulations. Two walruses were harvested on Cross Island in 2004, but no walruses have been harvested since 2005. To date, two percent of the total walrus harvest for Barrow, Nuiqsut, and Kaktovik from 1994 to 2009 has occurred within the geographic range of the incidental take regulations.

Polar Bear—Harvest Information

Alaska Natives from coastal villages are permitted to harvest polar bears. Current harvest levels are believed to be sustainable for the SBS population at present (USFWS unpubl. data). Although there are no restrictions under the MMPA, a more restrictive Native-to-Native agreement between the Inupiat from Alaska and the Inuvialuit in Canada was created in 1988. This agreement, referred to as the Inuvialuit-Inupiat Polar Bear Management Agreement, established quotas and recommendations concerning protection of denning females, family groups, and methods of take. Although this Agreement does not have the force of law from either the Canadian or the U.S. Governments, the users have abided by its terms. In Canada, users are subject to provincial regulations consistent with the Agreement. Commissioners for the Inuvialuit-Inupiat Agreement set the original quota at 76 bears in 1988, and it was later increased to 80. The quota was based on estimates of the population size and age-specific estimates of survival and recruitment. One estimate suggests that harvest up to 1.5 percent of the adult females was sustainable. Combining this estimate and a 2:1 sex ratio (male:female) of the harvest ratio, 4.5 percent of the total population could be harvested each year. In July 2010, at the most recent Inuvialuit-Inupiat Polar Bear Management Meeting, the quota was reduced from 80 to 70 bears per year.

The Service has monitored the Alaska polar bear harvest since 1980. The Native subsistence harvest from the SBS has remained relatively consistent since 1980 and averages 36 bears removed per year. The combined harvest from Alaska and Canada from the SBS appears sustainable and equitable. During the period 2005–2009, 84 bears were harvested by residents of Barrow, 11 for Kaktovik, 6 for Nuiqsut, 13 for Wainwright, and 3 for Atqasuk for a total of 117 bears harvested. This was a decline of 40 harvested bears from the previous timeframe analyzed (2000–2004: 157 bears harvested). The Native subsistence harvest is the largest source of mortality related to human activities, although several bears have been killed during research activities, through euthanasia of sick or injured bears, by accidental drowning, or in defense of human life by non-Natives.

Plan of Cooperation

As a condition of incidental take authorization, and to ensure that Industry activities do not impact subsistence opportunities for communities using the geographic region, any applicant requesting an LOA is required to present a record of communication that reflects discussions with the Native communities most likely affected by the activity. The North Slope native communities that could potentially be affected by Industry activities include Barrow, Nuiqsut, and Kaktovik. Polar bears and Pacific walruses inhabiting the Beaufort Sea represent a small portion, in terms of the number of animals, of the total subsistence harvest of fish and wildlife for the villages of Barrow, Nuiqsut, and Kaktovik. Nevertheless, harvest of these species is important to Alaska Natives. Therefore, an important aspect of the LOA process is that, prior to issuance of an LOA, Industry must provide evidence to the Service that an adequate POC has been coordinated with any affected subsistence community (or, as appropriate, with the EWC, the Alaska Nanuuq Commission (ANC), and the North Slope Borough (NSB)) if, after community consultations, Industry and the community conclude that increased mitigation and monitoring is necessary to minimize impacts to subsistence resources. Where relevant, a POC will describe measures to be taken to mitigate potential conflicts between the proposed activity and subsistence hunting. If requested by Industry or the affected subsistence community, the Service will review these plans and provide guidance. The Service will reject POCs if they do not provide adequate safeguards to ensure that any taking by Industry will not have an unmitigable adverse impact on the availability of polar bears and walruses for taking for subsistence uses.

Included as part of the POC process and the overall State and Federal permitting process of Industry activities, Industry engages the Native communities in numerous informational meetings. During these community meetings, Industry must ascertain if community responses indicate that impact to subsistence uses will occur as a result of activities in the requested LOA. If community concerns suggest that Industry activities may have an impact on the subsistence uses of these species, the POC must provide the procedures on how Industry will work with the affected Native communities and what actions will be taken to avoid interfering with the availability of polar bears and walruses for subsistence harvest.

Evaluation of Anticipated Effects of Activities on Subsistence Uses

No unmitigable concerns from the potentially affected communities

regarding the availability of polar bears or walruses for subsistence uses have been identified through Industry consultations in the potentially affected communities of Barrow, Nuiqsut, and Kaktovik in the geographic region.

Because of the proximity of Industry activities to the location of its hunting areas for polar bears and walruses, Nuiqsut continues to be the community most likely to be affected by these activities. Nuiqsut is located within 8 km (5 mi) of ConocoPhillips' Alpine production field to the north and ConocoPhillips' Alpine Satellite development field to the west. For this rule, we determined that the total taking of polar bears and walruses will not have an unmitigable adverse impact on the availability of these species for subsistence uses to Nuiqsut residents during the duration of the regulation. We base this conclusion on: the results of coastal aerial surveys conducted between 2000 and 2009 within the area; direct observations of polar bears occurring on Cross Island during Nuiqsut's annual fall bowhead whaling efforts; and anecdotal reports and recent sightings of polar bears by Nuiqsut residents. In addition, we have received no evidence or reports that bears are being deflected (*i.e.,* altering habitat use patterns by avoiding certain areas) or being impacted in other ways by the existing level of oil and gas activity near communities or traditional hunting areas that would diminish their availability for subsistence use, and we do not expect any change in the impact of future activities during the regulatory period.

Barrow and Kaktovik are expected to be affected differently and to a lesser degree by oil and gas activities than Nuiqsut due to their distance from known Industry activities during the 5-year period of the regulations. Through aerial surveys, direct observations, community consultations, and personal communication with hunters, it appears that subsistence opportunities for bears and walruses have not been impacted by past Industry operations conducted under previously issued ITRs, and we do not anticipate any new impacts to result from their activities.

Changes in activity locations may trigger community concerns regarding the effect on subsistence uses. Industry will need to remain proactive to address potential impacts on the subsistence uses by affected communities through consultations and, where warranted, POCs. Open communication through venues, such as public meetings, that allow communities to express feedback prior to the initiation of operations, will be required as part of an LOA application. If community subsistence use concerns arise from new activities, appropriate mitigation measures are available and will be applied, such as a cessation of certain activities at certain locations during specified times of the year (*i.e.,* hunting seasons). Hence, we find that any take will not have an unmitigable adverse impact on the availability of polar bears or walruses for subsistence uses by residents of the affected communities.

Potential Effects of Oil and Gas Industry Activities on Pacific Walruses, Polar Bears, and Prey Species

Individual walruses and polar bears can be affected by Industry activities in numerous ways. These include: (1) Noise disturbance; (2) physical obstructions; (3) human encounters; and (4) effects on prey.

Pacific Walrus

The Beaufort Sea is beyond the normal range of the Pacific walrus, and the likelihood of encountering walruses during Industry operations is low. During the time period of these regulations, Industry operations may occasionally encounter small groups of walruses swimming in open water or hauled out onto ice floes or along the coast. Although interactions are expected to be infrequent, these activities could potentially result in some level of disturbances. The response of walruses to disturbance stimuli is highly variable. Anecdotal observations by walrus hunters and researchers suggest that males tend to be more tolerant of disturbances than females, and individuals tend to be more tolerant than groups. Females with dependent calves are considered least tolerant of disturbances. In other parts of their range, disturbance events are known to cause walrus groups to abandon land or ice haulouts and occasionally to result in trampling injuries or cow-calf separations, both of which are potentially fatal. Calves and young animals at the perimeter of the haulouts appear particularly vulnerable to trampling injuries.

1. Noise Disturbance

Noise generated by Industry activities, whether stationary or mobile, has the potential to disturb small numbers of walruses. Potential impacts of Industry-generated noise include displacement from preferred foraging areas, increased stress and energy expenditure, interference with feeding, and masking of communications. Any impact of Industry noise on walruses is likely to be limited to a few individuals due to their geographic range and seasonal distribution within the area of Industry activities. Pacific walruses generally inhabit the pack ice of the Bering Sea and do not normally range into the Beaufort Sea, although individuals and small groups are occasionally observed.

Reactions of marine mammals to noise sources, particularly mobile sources such as marine vessels, vary. Reactions depend on the individuals' prior exposure to the disturbance source, their need or desire to be in the particular habitat or area where they are exposed to the noise, and the visual presence of the disturbance sources. Walruses are typically more sensitive to disturbance when hauled out on land or ice than when they are in the water. In addition, females and young are generally more sensitive to disturbance than adult males.

A. Stationary Sources

Endicott, BP's Saltwater Treatment Plant (located on the West Dock Causeway), Oooguruk, and Northstar are the offshore facilities that could produce noise that has the potential to disturb walruses. Liberty, as part of the Endicott complex, will also have this potential when it commences operations. A few walruses have been observed in the vicinity of these facilities. Three walruses have hauled out on Northstar Island since its construction in 2000, and a walrus was observed swimming near the Saltwater Treatment Plant in 2004. In 2007, a female and subadult walrus were observed hauled out on the Endicott Causeway. In instances where walruses have been seen near these facilities, they have appeared to be attracted to them, possibly as resting areas or haulouts.

B. Mobile Sources

Seismic operations introduce substantial levels of noise into the marine environment. There are relatively few data available to evaluate the potential response of walruses to seismic operations. Although the hearing sensitivity of walruses is poorly known, source levels associated with marine 3D and 2D seismic surveys are thought to be high enough to cause temporary hearing loss in other pinniped species. Therefore, it is possible that walruses within the 180-decibel (dB re 1 μPa) safety radius for seismic activities could suffer temporary shifts in hearing thresholds.

Seismic surveys and high-resolution site clearance surveys are typically carried out in open-water conditions, where walrus numbers are expected to be low. The potential for interactions with large concentrations of walruses, which typically favor sea-ice habitats,

is, therefore, low. Seismic operations in the Beaufort Sea may, however, encounter small herds of walruses swimming in open water. Potential adverse effects of seismic noise on swimming walruses can be reduced through the implementation of sufficient, practicable monitoring coupled with adaptive management responses (where the mitigation measures required are dependent on what is discovered during monitoring).

Previous open-water seismic exploration has been conducted in nearshore ice-free areas. Any future open-water seismic exploration that will occur during the duration of this rule will also occur in nearshore ice-free areas. It is highly unlikely that walruses will be present in these areas. Therefore, it is not expected that seismic exploration would disturb walruses. Furthermore, with the adoption of the mitigation measures described in Section VI of the EA prepared in conjunction with this rulemaking, the Service concludes that the only anticipated effects of seismic operations in the Beaufort Sea would be short-term behavioral alterations of small numbers of walruses.

C. Vessel Traffic

Although seismic surveys and offshore drilling operations are expected to occur in areas of open water away from the pack ice, support vessels and/or aircraft servicing seismic and drill operations may encounter aggregations of walruses hauled out onto sea ice. The sight, sound, or smell of humans and machines could potentially displace these animals from any ice haulouts. Walruses react variably to noise from vessel traffic; however, it appears that low-frequency diesel engines cause less of a disturbance than high-frequency outboard engines. The reaction of walruses to vessel traffic is dependent upon vessel type, distance, speed, and previous exposure to disturbances. Walruses in the water appear to be less readily disturbed by vessels than walruses hauled out on land or ice. Walrus densities within their normal distribution are highest along the edge of the pack ice, an area that Industry vessel traffic typically avoids. Barges and vessels associated with Industry activities travel in open water and avoid large ice floes or land where walruses are likely to be found. In addition, walruses can use a vessel as a haul-out platform. In 2009, during Industry activities in the Chukchi Sea, an adult walrus was found hauled out on the stern of a vessel. It eventually left once confronted.

Drilling operations are expected to involve drill ships attended by icebreaking vessels to manage incursions of sea ice. Ice management operations are expected to have the greatest potential for disturbance because walruses are more likely to be encountered in sea ice habitats, and because ice management operations typically require the vessel to accelerate, reverse direction, and turn rapidly, thereby maximizing propeller cavitations and producing significant noise. Previous monitoring efforts in the Chukchi Sea suggest that icebreaking activities can displace some walrus groups up to several kilometers away; however, most groups of hauled-out walruses showed little reaction beyond 800 m (0.5 mi).

Monitoring programs associated with exploratory drilling operations in the Chukchi Sea in 1990 noted that 25 percent of walrus groups encountered in the pack ice during icebreaking responded by diving into the water, with most reactions occurring within 1 km (0.6 mi) of the ship. The monitoring report noted that: (1) Walrus distributions were closely linked with pack ice; (2) pack ice was near active prospects for relatively short time periods; and (3) ice passing near active prospects contained relatively few animals. The report concluded that effects of the drilling operations on walruses were limited in time, geographical scale, and the proportion of population affected.

When walruses are present, underwater noise from vessel traffic in the Beaufort Sea may ''mask'' ordinary communication between individuals by preventing them from locating one another. It may also prevent walruses from using potential habitats in the Beaufort Sea and may have the potential to impede movement. Vessel traffic will likely increase if offshore Industry expands and may increase if warming waters and seasonally reduced sea-ice cover alter northern shipping lanes.

Because offshore exploration activities are expected to move throughout the Beaufort Sea, impacts associated with support vessels and aircrafts are likely to be distributed in time and space. Therefore, the only effect anticipated would be short-term behavioral alterations impacting small numbers of walruses in the vicinity of active operations. Adoption of mitigation measures that include an 800-m (0.5-mi) exclusion zone for marine vessels around walrus groups observed on ice are expected to reduce the intensity of disturbance events and minimize the potential for injuries to animals.

D. Aircraft Traffic

Aircraft overflights may disturb walruses. Reactions to aircraft vary with range, aircraft type, and flight pattern, as well as walrus age, sex, and group size. Adult females, calves, and immature walruses tend to be more sensitive to aircraft disturbance. Fixed-winged aircraft are less likely to elicit a response than helicopter overflights. Walruses are particularly sensitive to changes in engine noise and are more likely to stampede when planes turn or fly low overhead. Researchers conducting aerial surveys for walruses in sea-ice habitats have observed little reaction to fixed-winged aircraft above 457 m (1,500 ft) (USFWS unpubl. data). Although the intensity of the reaction to noise is variable, walruses are probably most susceptible to disturbance by fast-moving and low-flying aircraft (100 m (328 ft) above ground level). Based on this information, and to make this rule more standard with other regulations within the same geographic area, the Service revised the minimum acceptable aircraft altitudes in § 18.128(a)(4)(ii) in the proposed rule from 305 m (1,000 ft) to 457 m (1,500 ft) in this final rule.

In 2002, a walrus hauled out near the SDC on the McCovey prospect was disturbed when a helicopter landed on the SDC. However, most aircraft traffic is in nearshore areas, where there are typically few or no walruses.

2. Physical Obstructions

Based on known walrus distribution and the very low numbers found in the Beaufort Sea near Prudhoe Bay, it is unlikely that walrus movements would be displaced by offshore stationary facilities, such as the Northstar Island or causeway-linked Endicott/Liberty complex, or vessel traffic. There is no indication that the few walruses that used Northstar Island as a haulout in 2001 were displaced from their movements. Vessel traffic could temporarily interrupt the movement of walruses or displace some animals when vessels pass through an area. This displacement would probably have minimal or no effect on animals and would last no more than a few hours.

3. Human Encounters

Human encounters with walruses could occur in the course of Industry activities, although such encounters would be rare due to the limited distribution of walruses in the Beaufort Sea. These encounters may occur within certain cohorts of the population, such as calves or animals under stress. In 2004, a suspected orphaned calf hauled out on the armor of Northstar Island

numerous times over a 48-hour period, causing Industry to cease certain activities and alter work patterns before it disappeared in stormy seas. Additionally, a walrus calf was observed for 15 minutes during an exploration program 18 m (60 ft) from the dock at Cape Simpson in 2006. It climbed onto an extended barge ramp, which was lowered. The walrus then jumped in the water the moment the crew member started the ramp engine.

4. Effect on Prey Species

Walruses feed primarily on immobile benthic invertebrates. The effect of Industry activities on benthic invertebrates most likely would be from oil discharged into the environment. Oil has the potential to impact walrus prey species in a variety of ways, including but not limited to mortality due to smothering or toxicity, perturbations in the composition of the benthic community, and altered metabolic and growth rates. Relatively few walruses are present in the central Beaufort Sea. It is important to note that, although the status of walrus prey species within the Beaufort Sea is poorly known, it is unclear what role, if any, prey abundance plays in limiting the use of the Beaufort Sea by walruses. Further study of the Beaufort Sea benthic community as it relates to walruses is warranted. The low likelihood of an oil spill large enough to affect prey populations (see analysis in the section titled Potential Impacts of Waste Product Discharge and Oil Spills on Pacific Walruses and Polar Bears, Pacific Walrus subsection) combined with the fact that walruses are not present in the region during the ice-covered season and occur only infrequently during the open-water season indicates that Industry activities will likely have limited indirect effects on walruses through effects on prey species.

Evaluation of Anticipated Effects on Walruses

As is the case for previously issued ITRs, Industry noise disturbance and associated vessel traffic may have a more pronounced impact than physical obstructions or human encounters on walruses in the Beaufort Sea. However, due to the limited number of walruses inhabiting the geographic region during the open-water season and the absence of walruses in the region during the ice-covered season, the Service anticipates minimal impact to only small numbers of individual walruses and that any take will have a negligible impact on this stock during the 5-year regulatory period.

Polar Bear

Polar bears are present in the region of activity. Therefore, oil and gas activities could impact polar bears in various ways during both open-water and ice-covered seasons. Impacts from: (1) Noise disturbance; (2) physical obstructions; (3) human encounters; and (4) effects on prey species are described below.

1. Noise Disturbance

Noise produced by Industry activities during the open-water and ice-covered seasons could potentially result in the take of polar bears. Noise disturbances may affect bears differently depending upon their reproductive status (*e.g.,* denning versus non-denning bears). The best available scientific information indicates that female polar bears entering dens, or females in dens with cubs, are more sensitive than other age and sex groups to noises.

Noise disturbance can originate from either stationary or mobile sources. Stationary sources include: construction, maintenance, repair, and remediation activities; operations at production facilities; flaring of excess gas; and drilling operations from either onshore or offshore facilities. Mobile sources include: vessel and aircraft traffic; open-water seismic exploration; winter vibroseis programs; geotechnical surveys; ice road construction and associated vehicle traffic, including tracked vehicles and snowmobiles; drilling; dredging; and ice-breaking vessels.

A. Stationary Sources

All production facilities on the North Slope in the area to be covered by this rulemaking are currently located within the landfast ice zone. Typically, most polar bears occur in the active ice zone, far offshore, hunting throughout the year, although some bears also spend a limited amount of time on land, coming ashore to feed, den, or move to other areas. At times, usually during the fall season when fall storms and ocean currents may deposit ice-bound bears on land, bears may remain along the coast or on barrier islands for several weeks until the ice returns.

Noise produced by stationary Industry activities could elicit variable responses from polar bears. The noise may act as a deterrent to bears entering the area, or the noise could potentially attract bears. Attracting bears to these facilities, especially exploration facilities in the coastal or nearshore environment, could result in human-bear encounters, unintentional harassment, lethal take, or intentional hazing (stipulated under separate authorization) of the bear.

Noise from Industry activities has the ability to disturb bears at den sites. However, the timing of potential Industry impacts relative to the time period in the denning cycle when any disturbance occurs can have varying impacts on the female bear and the family group. Researchers have suggested that disturbances, including noise, can negatively impact bears during the early stages of denning, where the pregnant female has limited investment at the site, by causing them to abandon the site in search of another one. Premature site abandonment may also occur after the bears have emerged, but while they are still at the den site, when cubs are acclimating to their ''new environment'' and the female bear is now vigilant of the environment in regards to her offspring. During this time, in-air noises may disturb the female to the point that she abandons the den site before the cubs are physiologically ready to move from the site.

An example of a den abandonment in the early stages of denning occurred in January 1985, where a female polar bear appears to have abandoned her den in response to Rolligon traffic, which was occurring within 500 m (1,640 ft) of the den site. In 2002, noise associated with a polar bear research camp in close proximity to a bear den is thought to have caused a female bear and her cub(s) to abandon their den and move to the ice prematurely. In 2006, a female and two cubs emerged from a den 400 m (1,312 ft) from an active river crossing construction site. The den site was abandoned within hours of cub emergence after only 3 days. In 2009, a female and two cubs emerged from a den site within 100 m (328 ft) of an active ice road with heavy traffic and quickly abandoned the site. While such events may have occurred, information indicates they have been infrequent and isolated. It is important to note that the knowledge of these recent examples occurred because of the monitoring and reporting program established by the ITRs.

Conversely, during the ice-covered seasons of 2000–2001 and 2001–2002, dens known to be active were located within approximately 0.4 km and 0.8 km (0.25 mi and 0.5 mi), respectively, of remediation activities on Flaxman Island in the Beaufort Sea with no observed impact to the polar bears. This example suggests that polar bears exposed to routine industrial noises may habituate to those noises and show less vigilance than bears not exposed to such stimuli. This observation came from a study that occurred in conjunction with industrial activities

performed on Flaxman Island in 2002 and a study of undisturbed dens in 2002 and 2003 (N = 8) (Smith *et al.* 2007). Researchers assessed vigilant behavior with two potential measures of disturbance: proportion of time scanning their surroundings and the frequency of observable vigilant behaviors. The two bears exposed to the industrial activity within 1.6 km (1 mi) spent less time scanning their surroundings than bears in undisturbed areas and engaged in vigilant behavior significantly less often.

The potential for disturbance increases once the female emerges from the den, where she is potentially more vigilant to sights and in-air sounds as she uses the den site. As noted earlier, in some cases, while the female is in the den, Industry activities have progressed near the den sites with no perceived disturbance to the bears. Indeed, in the 2006 den incident previously discussed, it was believed that Industry activity commenced in the area after the den had been established. Ancillary activities occurred within 50 m (164 ft) of the den site with no apparent disturbance while the female was in the den. Ongoing activity most likely had been occurring for approximately 3 months in the vicinity of the den. Likewise, in 2009, two bear dens were located along an active ice-road. The bear at one den site appeared to establish her site prior to ice road activity and was exposed to approximately 3 months of activity 100 m (328 ft) away and emerged at the appropriate time. The other den site was discovered after ice-road construction commenced. This site was exposed to ice-road activity, 100 m (328 ft) away, for approximately 1 month. In all, there have been three recorded examples (2006, 2009, and 2010) of pregnant female bears establishing dens prior to Industry activity occurring within 400 m (1,312 ft) of the den site, and remaining in the den through the normal denning cycle despite the nearby activity.

More recent data suggests that, with proper mitigation measures in effect, activities can continue in the vicinity of dens until emergence of the female bear. At that time, mitigation, such as activity shutdowns near the den and 24-hour monitoring of the den site can limit bear/human interactions, thereby allowing the female bear to abandon the den naturally and minimize impacts to the animals. For example, in the spring of 2010, an active den site was observed approximately 60 m (197 ft) from a heavily used ice road. A 1.6-km (1-mi) exclusion zone was established around the den, closing a 3.2-km (2-mi) portion of the road. Monitors were assigned to observe bear activity and monitor human activity to minimize any other impacts to the bear group. These mitigation efforts minimized disturbance to the bears and allowed them to abandon the den site naturally.

B. Mobile Sources

During the open-water season in the SBS, polar bears spend the majority of their lives on the pack ice, which limits the chances of impacts on polar bears from Industry activities. Although polar bears have been documented in open water, miles from the ice edge or ice floes, such occurrences are relatively rare. In the open-water season, Industry activities are generally limited to vessel-based exploration activities, such as ocean-bottom cable (OBC) and shallow hazards surveys. These activities avoid ice floes and the multiyear ice edge; however, they may contact bears in open water, and the effects of such encounters will be short-term behavior disturbance. Polar bears are more likely to be affected by on-ice seismic surveys than open-water surveys. Although no on-ice seismic surveys have reported polar bear observations during the period of the last ITRs, disturbance from on-ice operations would most likely occur by vehicle and nonpermanent camp activity associated with the seismic project. These effects would be minimal due to the mobility of such projects and limited to small-scale alterations of bear movements.

C. Vessel Traffic

During the open-water season, most polar bears remain offshore associated with the multiyear pack ice and are not typically present in the ice-free areas where vessel traffic occurs. Barges and vessels associated with Industry activities travel in open water and avoid large ice floes. If there is any encounter between a vessel and a bear, it would most likely result in short-term behavioral disturbance only. Indeed, observations from monitoring programs report that, in the rare occurrence when bears are encountered swimming in open water, they retreat from the vessel as it passes the bear.

D. Aircraft Traffic

Routine aircraft traffic should have little or no effect on polar bears; however, extensive or repeated overflights of fixed-wing aircraft or helicopters could disturb polar bears. Behavioral reactions of non-denning polar bears should be limited to short-term changes in behavior, such as evading the plane by retreating from the stimulus. These reactions would have no long-term impact on individuals and no discernible impacts on the polar bear population. In contrast, denning bears may abandon or depart their dens early in response to repeated noise produced by extensive aircraft overflights. Mitigation measures, such as minimum flight elevations over polar bears or areas of concern and flight restrictions around known polar bear dens, will be required, as appropriate, to reduce the likelihood that bears are disturbed by aircraft.

E. Offshore Seismic Exploration and Exploratory Drilling

Although polar bears are typically associated with the pack ice during summer and fall, open-water seismic exploration activities can encounter polar bears in the central Beaufort Sea in late summer or fall. It is unlikely that seismic exploration activities or other geophysical surveys during the open-water season would result in more than temporary behavioral disturbance to polar bears. Any disturbance would be visual and auditory in nature, where bears could be deflected from their route. Polar bears could be encountered on ice, where they would be unaffected by underwater sound from the airguns. Bears could also be encountered in the water. Sound levels received by polar bears in the water would be attenuated because polar bears generally do not dive much below the surface and normally swim with their heads above the surface, where noises produced underwater are weak. Sound attenuation occurs because received levels of airgun sounds are reduced near the surface because of the pressure release effect at the water's surface (Greene and Richardson 1988, Richardson *et al.* 1995).

Noise and vibrations produced by oil and gas activities during the ice-covered season could potentially result in impacts on polar bears. During this time of year, denning female bears and mobile, non-denning bears could be exposed to, and affected differently by, potential impacts from seismic activities. As stated earlier, disturbances to denning females, either on land or on ice, are of particular concern.

As part of the LOA application for seismic surveys during denning season, Industry provides us with the proposed seismic survey routes. To minimize the likelihood of disturbance to denning females, the Service evaluates these routes along with information about known polar bear dens, historic denning sites, and delineated denning habitat prior to authorizing seismic activities.

Previous regulations have analyzed open-water exploration activity, such as

seismic and drilling activity, even though this type of open-water activity has not occurred on an annual basis in the Beaufort Sea. In the previous ITRs, open-water seismic programs and exploratory drilling programs were analyzed for impacts to polar bears and walruses. Due to the limited scope of the planned offshore activities, we concluded that this level of activity would affect only small numbers of polar bears and walrus and would have no more than negligible effects on the populations. The actual number of offshore seismic projects during the previous regulatory period was smaller than the amount analyzed. We issued LOAs for five offshore seismic projects, and no offshore drilling projects occurred, even though drilling projects were requested twice during the previous ITRs (2006–2011).

2. Physical Obstructions

There is some chance that Industry facilities would act as physical barriers to movements of polar bears. Most facilities are located onshore and inland, where polar bears are only occasionally found. The offshore and coastal facilities are most likely to be approached by polar bears. The majority of Industry observations or bears occur within 1.6 km (1 mi) of the coastline, as bears use this area as travel corridors. Bears traversing along the coastline can encounter Industry facilities located on the coast, such as CPAI and Eni facilities at Oliktok Point and the Point Thomson development. As bears contact these facilities, the chances for bear/human interactions increase. The Endicott and West Dock causeways, as well as the facilities supporting them, have the potential to act as barriers to movements of polar bears because they extend continuously from the coastline to the offshore facility. However, polar bears appear to have little or no fear of manmade structures and can easily climb and cross gravel roads and causeways, and polar bears have frequently been observed crossing existing roads and causeways in the Prudhoe Bay oilfields. Offshore production facilities, such as Northstar, may be approached by polar bears, but due to the layout of these facilities (*i.e.,* continuous sheet pile walls around the perimeter) and monitoring plans, the bears may not gain access to the facility itself. This situation may present a small-scale, local obstruction to the bears' movement, but it also minimizes the likelihood of bear/human encounters.

3. Human Encounters

Whenever humans work in polar bear habitat, there is a chance of an encounter, even though, historically, such encounters have been uncommon in association with Industry. Encounters can be dangerous for both polar bears and humans.

Although bears may be found along the coast during open-water periods, most of the SBS bear stock inhabits the multiyear pack ice during this time of year. Encounters are more likely to occur during fall and winter periods when greater numbers of the bears are found in the coastal environment searching for food and possibly den sites later in the season. Potentially dangerous encounters are most likely to occur at gravel islands or at on-ice exploratory sites. These sites are at ice level and are easily accessible by polar bears. Industry has developed and uses devices to aid in detecting polar bears, including bear monitors and motion detection systems. In addition, some companies take steps to actively prevent bears from accessing facilities using safety gates and fences.

Offshore production islands, such as the Northstar production facility, may attract polar bears. In 2004, Northstar accounted for 41 percent of all polar bear observations Industry-wide. Northstar reported 37 sightings, in which 54 polar bears were observed. The offshore sites continue to account for the majority of the polar bear observations. The offshore facilities of Endicott, Liberty, Northstar, and Oooguruk accounted for 47 percent of the bear observations between 2005 and 2008 (182 of 390 sightings). It should be noted that, although most bears were observed passing through the area, the sites may also serve as an attractant, which could result in increased incidence of harassment of bears. Employee training and company policies currently reduce and mitigate such encounters.

Depending upon the circumstances, bears can be either repelled from or attracted to sounds, smells, or sights associated with Industry activities. In the past, such interactions have been mitigated through conditions on the LOA, which require the applicant to develop a polar bear interaction plan for each operation. These plans outline the steps the applicant will take, such as garbage disposal procedures, to minimize impacts to polar bears by reducing the attraction of Industry activities to polar bears. Interaction plans also outline the chain of command for responding to a polar bear sighting. In addition to interaction plans, Industry personnel participate in polar bear interaction training while on site.

Employee training programs are designed to educate field personnel about the dangers of bear encounters and to implement safety procedures in the event of a bear sighting. As a result of these polar bear interaction plans and training programs, on-site personnel can detect bears and respond safely and appropriately. Often, personnel are instructed to leave an area where bears are seen. Many times polar bears are monitored until they move out of the area. Sometimes, this response involves deterring the bear from the site. If bears are reluctant to leave on their own, in most cases bears can be displaced by using pyrotechnics (*e.g.,* cracker shells) or other forms of deterrents (*e.g.,* vehicle, vehicle horn, vehicle siren, vehicle lights, spot lights). The purpose of these plans and training is to eliminate the potential for injury to personnel or lethal take of bears in defense of human life. Since the regulations went into effect in 1993, there has been no known instances of a bear being killed or Industry personnel being injured by a bear as a result of Industry activities. The mitigation measures associated with these regulations have been proven to minimize bear/human interactions and will continue to be requirements of future LOAs, as appropriate.

There is the potential for humans to come into contact with polar bear dens as well. Known polar bear dens around the oilfield, discovered opportunistically or as a result of planned surveys, such as tracking marked bears or den detection surveys, are monitored by the Service. However, these sites are only a small percentage of the total active polar bear dens for the SBS stock in any given year. Industry routinely coordinates with the Service to determine the location of Industry's activities relative to known dens and denning habitat. General LOA provisions require Industry operations to avoid known polar bear dens by 1.6 km (1 mi).

There is the possibility that an unknown den may be encountered during Industry activities as well. Between 2002 and 2010, six previously unknown maternal polar bear dens were encountered by Industry during the course of project activities. Once a previously unknown den is identified by Industry, the Service requires that the den be reported, triggering mitigation measures per response plans. Communication between Industry and the Service and the implementation of mitigation measures, such as the 1.6-km

(1-mi) exclusion area around the now-known den and 24-hour monitoring of the site, ensures that disturbance is minimized.

4. Effect on Prey Species

Ringed seals are the primary prey of polar bears in the Beaufort Sea and inhabit the nearshore waters where offshore Industry activities occur. Industry will mainly have an effect on seals through the potential for contamination (oil spills) or industrial noise disturbance. Effects of contamination from oil discharges for seals are described in the following section, ''Potential Impacts of Waste Product Discharge and Oil Spills on Pacific Walruses and Polar Bears,'' under the ''Pacific Walrus'' subsection.

Studies have shown that seals can be displaced from certain areas such as pupping lairs or haulouts and abandon breathing holes near Industry activity. However, these disturbances appear to have minor effects and are short term.

Evaluation of Anticipated Effects on Polar Bears

The Service anticipates that potential impacts of Industry noise, physical obstructions, and human encounters on polar bears would be limited to short-term changes in behavior and should have no long-term impact on individuals and no impacts on the polar bear population.

Potential impacts will be mitigated through various requirements stipulated within LOAs. Mitigation measures required for all projects will include a polar bear and/or walrus interaction plan and a record of communication with affected villages that may serve as the precursor to a POC with the village to mitigate effects of the project on subsistence activities. Mitigation measures that may be used on a case-by-case basis include the use of trained marine mammal monitors associated with marine activities, the use of den habitat maps developed by the U.S. Geological Survey (USGS), the use of FLIR or polar bear scent-trained dogs to determine the presence or absence of dens, timing of the activity to limit disturbance around dens, the 1.6-km (1-mi) buffer surrounding known dens, and suggested work actions around known dens. The Service implements certain mitigation measures based on need and effectiveness for specific activities based largely on timing and location. For example, the Service will implement different mitigation measures for a 2-month-long exploration project 30 km (approximately 20 mi) inland from the coast than for an annual nearshore development project in shallow waters. Based on past monitoring information, bears are more prevalent in the coastal areas than at such distances inland and, therefore, there may be differences in monitoring and mitigation measures required by the Service to limit the disturbance to bears and to limit human/bear interactions.

The Service manages Industry activities occurring in polar bear denning habitat by applying proactive and reactive mitigation measures to limit Industry impact to denning bears. Proactive mitigation measures are actions taken to limit den site exposure to Industry activities in denning habitat before den locations are known. They include the requirement of a polar bear interaction plan, possible den detection surveys, and polar bear awareness and safety training. Reactive mitigation measures are actions taken to minimize Industry impact to polar bear dens once the locations have been identified. They can include applying the 1.6-km (1-mi) buffer around the den site and 24-hour monitoring of the den site.

An example of the application of this process would be in the case of Industry activities occurring around a known bear den, where a standard condition of LOAs requires Industry projects to have developed a polar bear interaction plan and to maintain a 1.6-km (1-mi) buffer between Industry activities and any known denning sites. In addition, we may require Industry to avoid working in known denning habitat until bears have left their dens. To further reduce the potential for disturbance to denning females, we have conducted research, in cooperation with Industry, to enable us to accurately detect active polar bear dens through the use of remote sensing techniques, such as FLIR imagery, in concert with maps of denning habitat along the Beaufort Sea coast.

FLIR imagery, as a mitigation tool, is used in connection with coastal polar bear denning habitat maps. Industry activity areas, such as coastal ice roads, are compared to polar bear denning habitat, and transects are then created to survey the specific habitat within the Industry area. FLIR heat signatures within a standardized den location protocol are noted, and further mitigation measures are placed around these locations. FLIR surveys are more effective at detecting polar bear dens than are visual observations. The effectiveness increases when FLIR surveys are combined with site-specific, scent-trained dog surveys. These techniques will continue to be required as conditions of LOAs when appropriate.

In addition, Industry has sponsored cooperative research evaluating polar bear hearing (resulting in the development of polar bear audiograms); the transmission of noise and vibration through the ground, snow, ice, and air; and the received levels of noise and vibration in polar bear dens.

This information has been useful in refining site-specific mitigation measures. Using current mitigation measures, Industry activities have had no known polar bear population-level effects during the period of previous regulations. We anticipate that, with continued mitigation measures, the impacts to denning and non-denning polar bears will be at the same low level as in previous regulations.

Monitoring data suggest that the number of polar bear encounters in the oil fields fluctuates from year to year. Polar bear observations by Industry increased between 2004 and 2009 (89 bear observations in 2004 and 420 bear observations in 2009). These observations range from bears observed from a distance and passively moving through the area to bears that pose a threat to personnel and are hazed for their safety and the safety of Industry personnel. This increase in observations is believed to be due to increased numbers of bears using terrestrial habitat, an effort by Industry and the Service to increase polar bear awareness and safety among Industry personnel, and an increase in the number of people monitoring bear activities around the facilities. Although bear observations appear to have increased, bear/human encounters remain uncommon events. We anticipate that bear/human encounters during the 5-year period of these regulations will remain uncommon.

Potential Impacts of Waste Product Discharge and Oil Spills on Pacific Walruses and Polar Bears

Individual walruses and polar bears can potentially be affected by Industry activities through waste product discharge and oil spills. These potential impacts are described below.

Polar bear and walrus ranges overlap with many active and planned oil and gas operations. Polar bears may be susceptible to oil spills from platforms/production facilities and pipelines in both offshore and onshore habitat, while walruses are susceptible to oil spills from offshore facilities. To date, no major offshore oil spills have occurred in the Alaska Beaufort Sea. Some on-shore spills have occurred on the North Slope at production facilities or pipelines connecting wells to the Trans-Alaska Pipeline System with no known impacts to polar bears.

Oil spills are unintentional releases of oil or petroleum products. In accordance with the National Pollutant Discharge Elimination System Permit Program, all North Slope oil companies must submit an oil spill contingency plan. It is illegal to discharge oil into the environment, and a reporting system requires operators to report spills. Between 1977 and 1999, an average of 70 oil and 234 waste product spills occurred annually on the North Slope oil fields. Although most spills have been small (less than 50 barrels) by Industry standards, larger spills (more than 500 barrels) accounted for much of the annual volume. Seven large spills have occurred between 1985 and 2009 on the North Slope. The largest spill occurred in the spring of 2006, when approximately 984,000 liters (260,000 gallons) leaked from flow lines near an oil gathering center. In November 2009, a 174,000-liter (46,000-gallon) spill occurred as well. These spills originated in the terrestrial environment in heavily industrialized areas not used by polar bears or walrus and posed minimal harm to walruses and polar bears. To date, no major offshore spills have occurred on the North Slope.

Spills of crude oil and petroleum products associated with onshore production facilities during ice-covered and open-water seasons have been minor. Larger spills are generally production-related and could occur at any production facility or pipeline connecting wells to the Trans-Alaska Pipeline System. In addition to onshore sites, oil spills could occur at offshore facilities, such as causeway-linked Endicott or the sub-sea pipeline-linked Northstar Island. The trajectories of large offshore spills from Northstar and the proposed Liberty facilities have been modeled and analyzed in past ITRs to examine potential impacts to polar bears.

Oil spills in the marine environment that can accumulate at the ice edge, in ice leads, and similar areas of importance to polar bears and walruses are of particular concern. As additional offshore oil exploration and production projects come on line, the potential for large spills in the marine environment increases.

During the open-water season, polar bears could encounter oil if it is released during exploratory operations, from existing offshore platforms, or from a marine vessel spill. Furthermore, the shipping of crude oil or oil products could also increase the likelihood of an oil spill due to predicted reductions in Arctic sea ice extent and improved access to shipping lanes, where a projected extended shipping season is expected to occur around the margins of the Arctic Basin.

Spilled oil present in fall or spring during formation or breakup of ice presents a greater risk because of both the difficulties associated with cleaning oil in mixed, broken ice, and the presence of bears and other wildlife in prime feeding areas over the Continental Shelf during this period. Oil spills occurring in areas where polar bears are concentrated, such as along off-shore leads or polynyas, and along terrestrial habitat where marine mammal carcasses occur, such as at Cross and Barter islands during fall whaling, would affect more bears than spills in other areas.

Oiling of food sources, such as ringed seals, may result in indirect effects on polar bears, such as a local reduction in ringed seal numbers, or a change in the local distribution of seals and bears. More direct effects on polar bears could occur from: (1) Ingestion of oiled prey, potentially resulting in reduced survival of individual bears; (2) oiling of fur and subsequent ingestion of oil from grooming; and (3) disturbance, injury, or death from interactions with humans during oil spill response activities. Polar bears may be particularly vulnerable to disturbance when nutritionally stressed and during denning. Cleanup operations that disturb a den could result in the death of cubs through abandonment, and perhaps death of the sow as well. In spring, females with cubs of the year that denned near or on land and migrate to offshore areas may encounter oil (Stirling *in* Geraci and St. Aubin 1990).

In the event of an oil spill, Service–approved response strategies are in place to reduce the impact of a spill on wildlife populations. Response efforts will be conducted under a three-tier approach characterized as: (1) Primary response—involving containment, dispersion, burning, or cleanup of oil; (2) secondary response—involving hazing, herding, preventative capture/relocation, or additional methods to remove or deter wildlife from affected or potentially affected areas; and (3) tertiary response—involving capture, cleaning, treatment, and release of wildlife. If the decision is made to conduct response activities, primary and secondary response options will be vigorously applied, since little evidence exists that tertiary methods will be effective for cleaning oiled polar bears.

OCS operators are advised to review the Service's *Oil Spill Response Plan for Polar Bears in Alaska* at (*http://www.fws.gov/Contaminants/FWS_OSCP_05/FWSContingencyTOC.htm*) when developing spill-response tactics. Several factors will be considered when responding to an oil spill. They include the location of the spill, the magnitude of the spill, oil viscosity and thickness, accessibility to spill site, spill trajectory, time of year, weather conditions (*i.e.,* wind, temperature, precipitation), environmental conditions (*i.e.,* presence and thickness of ice), number, age, and sex of polar bears that are (or are likely to be) affected, degree of contact, importance of affected habitat, cleanup proposal, and likelihood of bear/human interactions.

The BOEMRE has acknowledged that there are difficulties in effective oil-spill response in broken-ice conditions, and The National Academy of Sciences has determined that ''no current cleanup methods remove more than a small fraction of oil spilled in marine waters, especially in the presence of broken ice.'' The BOEMRE advocates the use of nonmechanical methods of spill response, such as in-situ burning, during periods when broken ice would hamper an effective mechanical response (MMS 2008b). An in situ burn has the potential to rapidly remove large quantities of oil and can be employed when broken-ice conditions may preclude mechanical response. However, oil spill cleanup in the broken-ice and open-water conditions that characterize Arctic waters is problematic.

Evaluation of Effects of Oil Spills

Pacific Walrus

As stated earlier, the Beaufort Sea is not within the primary range for the Pacific walrus; therefore, the probability of walruses encountering oil or waste products as a result of a spill from Industry activities is low. Onshore oil spills would not impact walruses unless oil moved into the offshore environment. In the event of a spill that occurs during the open-water season, oil in the water column could drift offshore and possibly encounter a small number of walruses. Oil spills from offshore platforms could also contact walruses under certain conditions. Spilled oil during the ice-covered season not cleaned up could become part of the ice substrate and be eventually released back into the environment during the following open-water season. During spring melt, oil would be collected by spill response activities, but it could eventually contact a limited number of walruses.

Little is known about the effects of oil specifically on walruses; no studies have been conducted. Hypothetically, walruses may react to oil much like other pinnipeds. Adult walruses may not be severely affected by the oil spill

through direct contact, but they will be extremely sensitive to any habitat disturbance by human noise and response activities. In addition, due to the gregarious nature of walruses, an oil spill would most likely affect multiple individuals in the area. Walruses may also expose themselves more often to the oil that has accumulated at the edge of a contaminated shore or ice lead if they repeatedly enter and exit the water.

Walrus calves are most likely to suffer the effects of oil contamination. Female walruses with calves are very attentive, and the calf will stay close to its mother at all times, including when the female is foraging for food. Walrus calves can swim almost immediately after birth and will often join their mother in the water. It is possible that an oiled calf will be unrecognizable to its mother either by sight or by smell, and be abandoned. However, the greater threat may come from an oiled calf that is unable to swim away from the contamination and a devoted mother that will not leave without the calf, resulting in the potential mortality of both animals.

Walruses have thick skin and blubber layers for insulation and very little hair. Thus, they exhibit no grooming behavior, which lessens their chance of ingesting oil. Heat loss is regulated by control of peripheral blood flow through the animal's skin and blubber. The peripheral blood flow is decreased in cold water and increased at warmer temperatures. Direct exposure of walruses to oil is not believed to have any effect on the insulating capacity of their skin and blubber, although it is unknown if oil could affect their peripheral blood flow.

Damage to the skin of pinnipeds can occur from contact with oil because some of the oil penetrates into the skin, causing inflammation and the death of some tissue. The dead tissue is discarded, leaving behind an ulcer. While these skin lesions have only rarely been found on oiled seals, the effects on walruses may be greater because of a lack of hair to protect the skin. Direct exposure to oil can also result in conjunctivitis. Like other pinnipeds, walruses are susceptible to oil contamination in their eyes. Continuous exposure to oil will quickly cause permanent eye damage.

Inhalation of hydrocarbon fumes presents another threat to marine mammals. In studies conducted on pinnipeds, pulmonary hemorrhage, inflammation, congestion, and nerve damage resulted after exposure to concentrated hydrocarbon fumes for a period of 24 hours. If the walruses were also under stress from molting, pregnancy, *etc.,* the increased heart rate associated with the stress would circulate the hydrocarbons more quickly, lowering the tolerance threshold for ingestion or inhalation.

Walruses are benthic feeders, and much of the benthic prey contaminated by an oil spill would be killed immediately. Benthic organisms that survived would become contaminated from oil in bottom sediments, possibly resulting in slower growth and a decrease in reproduction. Bivalve mollusks, a favorite prey species of the walrus, are not effective at processing hydrocarbon compounds, resulting in highly concentrated accumulations and long-term retention of the contamination within the organism. In addition, because walruses feed primarily on mollusks, they may be more vulnerable to a loss of this prey species than other pinnipeds that feed on a larger variety of prey. Furthermore, complete recovery of a bivalve mollusk population may take 10 years or more, forcing walruses to find other food resources or to move to nontraditional areas.

The small number of walruses in the Beaufort Sea and the low potential for a large oil spill, which is discussed in the following Risk Assessment Analysis, limit potential impacts to walruses to only certain events (a large oil spill) and then only to a limited number of individuals. In the unlikely event that there is an oil spill and walruses in the same area, mitigation measures, especially those to deflect and deter animals from spilled areas, would minimize any effect. Fueling crews have personnel that are trained to handle operational spills and contain them. If a small offshore spill occurs, spill response vessels are stationed in close proximity and respond immediately. A detailed discussion of oil spill prevention and response for walruses can be found at the following Web site: (*http://www.fws.gov/Contaminants/FWS_OSCP_05/fwscontingencyappendices/L-WildlifePlans/WalrusWRP.doc*).

Polar Bear

The possibility of oil and waste product spills from Industry activities and their subsequent impacts on polar bears are a major concern. Polar bears could encounter oil spills during the open-water and ice-covered seasons in offshore or onshore habitats. Although the majority of the SBS polar bear population spends much of its time offshore on the pack ice, some bears are likely to encounter oil regardless of the season or location in which a spill occurs.

Small spills of oil or waste products throughout the year could potentially impact small numbers of bears. The effects of fouling fur or ingesting oil or wastes, depending on the amount of oil or wastes involved, could be short term or result in death. For example, in April 1988, a dead polar bear was found on Leavitt Island, approximately 9.3 km (5 nautical mi) northeast of Oliktok Point. The cause of death was determined to be poisoning by a mixture that included ethylene glycol and Rhodamine B dye. While the bear's death was human-caused, the source of the mixture was unknown.

During the ice-covered season, mobile, non-denning bears would have a higher probability of encountering oil or other production wastes than non-mobile, denning females. Current management practices by Industry, such as requiring the proper use, storage, and disposal of hazardous materials, minimize the potential occurrence of such incidents. In the event of an oil spill, it is also likely that polar bears would be intentionally hazed to keep them away from the area, further reducing the likelihood of impacting the population.

In 1980, Canadian scientists performed experiments that studied the effects on polar bears of exposure to oil. Effects on experimentally oiled polar bears (where bears were forced to remain in oil for prolonged periods of time) included acute inflammation of the nasal passages, marked epidermal responses, anemia, anorexia, and biochemical changes indicative of stress, renal impairment, and death. Many effects did not become evident until several weeks after the experiment (Oritsland *et al.* 1981).

Oiling of the pelt causes significant thermoregulatory problems by reducing the insulation value. Irritation or damage to the skin by oil may further contribute to impaired thermoregulation.

Experiments on live polar bears and pelts showed that the thermal value of the fur decreased significantly after oiling, and oiled bears showed increased metabolic rates and elevated skin temperature. Oiled bears are also likely to ingest oil as they groom to restore the insulation value of the oiled fur.

Oil ingestion by polar bears through consumption of contaminated prey, and by grooming or nursing, could have pathological effects, depending on the amount of oil ingested and the individual's physiological state. Death could occur if a large amount of oil were ingested or if volatile components of oil were aspirated into the lungs. Indeed,

two of three bears died in the Canadian experiment, and it was suspected that the ingestion of oil was a contributing factor to the deaths. Experimentally oiled bears ingested much oil through grooming. Much of it was eliminated by vomiting and in the feces; some was absorbed and later found in body fluids and tissues.

Ingestion of sublethal amounts of oil can have various physiological effects on a polar bear, depending on whether the animal is able to excrete or detoxify the hydrocarbons. Petroleum hydrocarbons irritate or destroy epithelial cells lining the stomach and intestine, thereby affecting motility, digestion, and absorption.

Polar bears swimming in, or walking adjacent to, an oil spill could inhale petroleum vapors. Vapor inhalation by polar bears could result in damage to various systems, such as the respiratory and the central nervous systems, depending on the amount of exposure.

Oil may also affect food sources of polar bears. Seals that die as a result of an oil spill could be scavenged by polar bears. Consumption of contaminated carcasses would increase exposure of the bears to hydrocarbons and could result in death or reduced survival of individual bears. A local reduction in ringed seal numbers as a result of direct or indirect effects of oil could temporarily affect the local distribution of polar bears. A reduction in the density of seals as a direct result of mortality from contact with spilled oil could result in polar bears not using a particular area for hunting. Possible impacts from the loss of a food source include reduced recruitment and/or survival.

Spilled oil also can concentrate and accumulate in leads and openings that occur during spring break-up and autumn freeze-up periods. Such concentrations of spilled oil increase the chance that polar bears and their principal prey would be oiled. To access ringed and bearded seals, polar bears in the SBS concentrate in shallow waters less that 300 m (984 ft) deep over the continental shelf and in areas with greater than 50 percent ice cover (Durner *et al.* 2004).

Due to their seasonal use of nearshore habitat, the times of greatest impact from an oil spill on polar bears are likely the open-water and broken-ice periods (summer and fall). Distributions of polar bears are not uniform through time. Nearshore and offshore polar bear densities are greatest in fall, and polar bear use of coastal areas during the fall open-water period has increased in recent years in the Beaufort Sea. This change in distribution has been correlated with the distance to the pack ice at that time of year (*i.e.,* the farther from shore the leading edge of the pack ice is, the more bears are observed onshore). An analysis of data collected 2001–2005 during the fall open-water period concluded: (1) On average approximately 4 percent of the estimated 1,526 polar bears in the Southern Beaufort population were observed onshore in the fall; (2) 80 percent of bears onshore occurred within 15 km (9.3 mi) of subsistence-harvested bowhead whale carcasses, where large congregations of polar bears have been observed feeding; and (3) sea-ice conditions affected the number of bears on land and the duration of time they spent there (Schliebe *et al.* 2006). Hence, bears concentrated in areas where beach-cast marine mammal carcasses occur during the fall would likely be more susceptible to oiling.

The persistence of toxic subsurface oil and chronic exposures, even at sublethal levels, can have long-term effects on wildlife (Peterson *et al.* 2003). Although it may be true that small numbers of bears may be affected by an oil spill initially, the long-term impact could be much greater. Long-term oil effects could be substantial through interactions between natural environmental stressors and the compromised health of exposed animals, and through chronic, toxic exposure as a result of bioaccumulation. Polar bears are biological sinks for pollutants because they are the apical predator of the Arctic ecosystem and are also opportunistic scavengers of other marine mammals. Additionally, their diet is composed mostly of high-fat sealskin and blubber (Norstrom *et al.* 1988). The highest concentrations of persistent organic pollutants in Arctic marine mammals have been found in polar bears and seal-eating walruses near Svalbard (Norstrom *et al.* 1988, Andersen *et al.* 2001, Muir *et al.* 1999). As such, polar bears would be susceptible to the effects of bioaccumulation of contaminants associated with spilled oil, which could affect the bears' reproduction, survival, and immune systems. Sublethal, chronic effects of any oil spill may further suppress the recovery of polar bear populations due to reduced fitness of surviving animals.

Subadult polar bears are more vulnerable than adults to environmental effects (Taylor *et al.* 1987). Subadult polar bears would be most prone to the lethal and sublethal effects of an oil spill due to their proclivity for scavenging (thus increased exposure to oiled marine mammals) and their inexperience in hunting. Because of the greater maternal investment a weaned subadult represents, reduced survival rates of subadult polar bears have a greater impact on population growth rate and sustainable harvest than reduced litter production rates (Taylor *et al.* 1987).

To date, large oil spills from Industry activities in the Beaufort Sea and coastal regions that would impact polar bears have not occurred, although the interest in, and the development of, offshore hydrocarbon reservoirs has increased the potential for large offshore oil spills. With limited background information available regarding oil spills in the Arctic environment, the outcome of such a spill is uncertain. For example, in the event of a large spill (*e.g.,* 5,900 barrels (equal to a rupture in the Northstar pipeline and a complete drain of the subsea portion of the pipeline), oil would be influenced by seasonal weather and sea conditions, including temperature, winds, wave action, and currents. Weather and sea conditions also affect the type of equipment needed for spill response and the effectiveness of spill cleanup. Based on the experiences of cleanup efforts following the Exxon Valdez oil spill, where logistical support was readily available, spill response may be largely unsuccessful in open-water conditions. Indeed, spill response drills have been unsuccessful in the cleanup of oil in broken-ice conditions.

The major concern regarding large oil spills is the impact a spill would have on the survival and recruitment of the SBS polar bear population. Currently, this bear population is approximately 1,500 bears. The maximum sustainable subsistence harvest is now 70 bears for this population (divided between Canada and Alaska). The population may be able to sustain the additional mortality caused by a large oil spill if a small number of bears are killed; however, the effect of numerous bear deaths due to the direct or indirect effects from a large oil spill would be additive to the effect of the subsistence harvest, likely resulting in reduced population recruitment and survival. Indirect effects may occur through a local reduction in seal productivity or the scavenging of oiled seal carcasses, or through other potential impacts, both natural and human-induced. The removal of a large number of bears from the population would exceed sustainable levels, potentially causing a decline in the bear population and affecting bear productivity and subsistence use.

Evaluation of the potential impacts of Industry waste products and oil spills suggests that individual bears could be

impacted by the disturbances (Oritsland *et al.* 1981). Depending on the amount of oil or wastes involved and the timing and location of a spill, impacts could be short-term, chronic, or lethal. In order for bear reproduction or survival to be impacted at the population level, a large-volume oil spill would have to take place. The following section analyzes the likelihood and potential effects of such a large-volume oil spill.

Oil Spill Risk Assessment: Potential Impacts to Polar Bears From a Large Oil Spill in the Beaufort Sea

Potential adverse impacts to polar bears and Pacific walruses from a large oil spill as a result of industrial activities in the Beaufort Sea are a major concern. As part of the incidental take regulatory process, the Service evaluates potential impacts of oil spills within the regulation area, even though the MMPA does not authorize the incidental take of marine mammals as the result of illegal actions, such as oil spills. Any event that results in a lethal outcome to a marine mammal is not authorized under this rule.

In this section, we provide a qualitative assessment of the likelihood that polar bears may be oiled by a large oil spill. We considered: (1) The probability of a large oil spill occurring in the Beaufort Sea; (2) the probability of that oil spill impacting nearshore coastal polar bear habitat; (3) the probability of polar bears being in the area and coming into contact with that large oil spill; and (4) the number of polar bears that could potentially be impacted by the spill. The majority of the information in this evaluation is qualitative; however, it is clear that the probability of all of these events occurring sequentially in a manner that impacts polar bears in the Beaufort Sea is low.

The analysis was based on polar bear distribution and habitat use from four sources of information that, when combined, allowed us to make conclusions on the risk of oil spills to polar bears. This information included: (1) The description of existing offshore oil and gas production facilities, particularly information pertinent to an oil spill originating from those facilities; (2) the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) Oil-Spill Risk Analysis (OSRA) for the Beaufort Sea Outer Continental Shelf (OCS), which allowed us to qualitatively analyze the risk to polar bears and their habitat from a marine oil spill; (3) the most recent polar bear risk assessment from the previous ITRs; and (4) polar bear distribution information from Service-supported polar bear aerial coastal surveys from 2000 to present. When taken separately, each piece of information tells only a part of the story, but with this assessment we combine pertinent information from multiple sources and create a qualitative assessment of the potential impacts to polar bears from a large oil spill.

There is increasing interest in developing offshore oil and gas reserves in the U.S. Beaufort and Chukchi seas, where the estimate of recoverable oil is up to approximately 19 billion barrels (BOEMRE 2010a). Development of offshore production facilities with supporting pipelines increases the potential for large offshore spills. The probability of a large oil spill from an offshore oil and gas facility and the risk to polar bears is a scenario that has been considered in previous regulations (71 FR 43926; August 2, 2006). With the limited background information available regarding the effects of large oil spills on polar bears in the marine Arctic environment, the impact of a large oil spill is uncertain. As far as is known, polar bears have not been affected by oil spilled as a result of North Slope industrial activities to date.

As previously noted, walruses are rare in the Beaufort Sea. Therefore, they are unlikely to encounter oil spills there, and were not considered in this analysis. Only polar bears were considered for this analysis. In order to effectively evaluate how a large oil spill may affect polar bears, we considered the following factors in developing our oil spill assessment for polar bears:

1. The origin (location) of a large spill;
2. The volume of a spill;
3. Oil viscosity;
4. Accessibility to spill site;
5. Spill trajectory;
6. Time of year;
7. Weather conditions (*i.e.,* wind, temperature, precipitation);
8. Environmental conditions (*i.e.,* presence and thickness of ice);
9. Number, age, and sex of polar bears that are (or likely to be) affected;
10. Degree of contact;
11. Importance of affected habitat; and
12. Mitigation measures to prevent bears from encountering spilled oil.

Description of Offshore Oil and Gas Facilities

Currently, there are three offshore oil and gas facilities producing oil in State waters of the Beaufort Sea: Endicott, Northstar, and Oooguruk. Two more, Liberty and Nikaitchuq, are expected to commence production during the 5-year period analyzed for these regulations. The production facilities are described generally earlier in these regulations. Here we describe the characteristics relevant to an oil spill risk assessment.

Endicott and Liberty

The Endicott oilfield is located approximately 16 km (10 mi) northeast of Prudhoe Bay. It is the oldest offshore facility, beginning production in 1986. The main production island for Endicott is located approximately 5 km (3 mi) offshore in approximately 3 m (10 ft) of water. Endicott is connected to the mainland by a causeway.

The Liberty field is currently under development; the current project concept is to use ultra-extended-reach drilling technology to access the Liberty reservoir from existing facilities at the Endicott Satellite Drilling Island (SDI), located approximately 4 km (2.5 mi) from shore in 3 m (10 ft) of water. The SDI is connected to the mainland by a common causeway with Endicott. The two facilities are approximately 8 km (5 mi) apart. Endicott and Liberty oils are medium-weight viscous crudes with American Petroleum Institute (API) gravities of 24 and 27 degrees (°), respectively. For the purposes of this analysis, due to their close proximity and their being connected by a common causeway, we considered the two facilities a complex.

Northstar

The Northstar oilfield is located 10 km (6 mi) from Prudhoe Bay in approximately 10 m (40 ft) of water. It began producing oil in 2001. Northstar oil is transported from a gravel island to shore via a 10-km (6-mi) subsea pipeline buried in a trench in the sea floor. Northstar crude is a light low-viscosity oil with an API gravity of 42°. Of the existing offshore facilities, Northstar is located the farthest from shore.

Oooguruk

The Oooguruk Unit is located adjacent to the Kuparuk River Unit in shallow waters of Harrison Bay. An offshore gravel island was constructed in 2006 on State of Alaska leases. A subsea pipeline was constructed to transfer produced fluids 9.2 km (5.7 mi) from the offshore gravel island to shore. Oooguruk began production in 2008. The Oooguruk development has targeted two separate reservoirs from a single offshore drill site. The principal reservoir is the Nuiqsut, which contains heavy to medium viscosity oil with 19–25° API gravity. The secondary reservoir is the Kuparuk C sandstone, which contains medium viscosity oil ranging from 24–26° API gravity. Oooguruk is located in shallow water less than 3 m (10 ft) southeast of Thetis Island in the Colville River outflow.

Nikaitchuq

The offshore portion of Nikaitchuq, the Spy Island Development, is located south of the barrier islands of the Jones Island group. The Spy Island Development is located in shallow water (less than 10 feet). Onshore facilities for the Nikaitchuq Unit are located at Oliktok Point and at an offshore gravel island near Spy Island, 6.4 km (4 mi) north of Oliktok Point. The offshore pad is located in shallow water 3 meters (10 feet) deep. Oil from the Nikaitchuq prospect is a heavy crude from the Schrader Bluff formation, sometimes with sand in it, found in a shallow reservoir less than 1,200 m (4,000 ft). The wells require an electrical submersible pump to produce oil because they are not capable of unassisted flow. The flow can be stopped by turning off the pump. Oil production at Nikaitchuq began production in 2011.

Large Oil Spill Analysis

The oil-spill scenario for this analysis considers the potential impacts from large oil spills resulting from oil production at the four developments described above. We define large oil spills as greater than or equal to 1,000 barrels. Estimating a large oil-spill occurrence is accomplished by examining a wide variety of probabilities. Uncertainty exists regarding the number, location, and size of a large oil spill or spills and the wind, ice, and current conditions at the time of a spill, but we have made every effort to identify the most likely spill scenarios and sources of risk to polar bears.

In order to analyze oil spill impacts to polar bears from the offshore sites, we incorporated both quantitative and anecdotal information. The quantitative assessment of oil spill risk for the current request for incidental take regulations considered: (1) Conditional oil spill probabilities from offshore production sites, reflected primarily in BOEMRE's OSRA; and (2) oil spill trajectory models and their relation to a polar bear distribution model. Conditional probabilities analysis assumes that a large spill has occurred and that no cleanup takes place. The probability of a spill occurring would be different for each site depending upon oil type, depth, oil flow rates, *etc.* The analysis included information from the BOEMRE OSRA in regard to polar bear environmental resource areas (ERAs) and land segments (LSs), reviewed previous risk assessment information of polar bears in prior ITRs, and analyzed polar bear distribution using the Service's coastal survey data for 2000 to present.

BOEMRE Oil Spill Risk Analysis

Because the BOEMRE OSRA provides the most current and rigorous treatment of potential oil spills in the Beaufort Sea, our analysis of potential oil spill impacts applied the BOEMRE's most recent OSRA (MMS 2008a) to help analyze potential impacts of a large oil spill originating in the OCS to polar bears. The OSRA is a computer model that analyzes how and where large offshore spills will likely move (Smith *et al.* 1982). To estimate the likely trajectory of large oil spills, the OSRA model used information about the physical environment, including data on wind, sea ice, and currents. As a conditional model, the OSRA is a hypothetical analysis of an oil spill. It is important to note that the OSRA assumes that a spill has occurred; it does not analyze the likelihood of an oil spill event.

The BOEMRE OSRA model was developed for the Federal offshore waters and does not include analysis of oil spills in the State of Alaska (controlled, nearshore waters). Northstar, Oooguruk, Nikaitchuq, and the Endicott/Liberty complex are located in nearshore, State waters. Northstar has one Federal well, and Liberty is a Federal reservoir developed from State lands. Although the OSRA cannot calculate trajectories of oil spills originating from specific locations in the nearshore area, it can be used to help examine how habitat may be affected by a spill should one originate in the OCS. We can then compare the location of the affected habitat to habitat use by bears.

Large Spill Size and Source Assumptions

As stated in Appendix A of the Arctic Multi-sale DEIS (MMS 2008b), large spills are those spills of 1,000 barrels or more and are assumed to persist on the water long enough to allow a trajectory analysis. Persistence depends upon weather, weight of oil, success of cleanup, *etc.* The model predicted where the oil trajectory would go if the oil persisted as a slick at a particular time of year. Spills smaller than 1,000 barrels would not be expected to persist on the water long enough to warrant a trajectory analysis. For this reason, we only analyzed the effects of a large oil spill. Although no large spills from oil and gas activities have occurred on the Alaska OCS to date, the large spill-size assumptions used by BOEMRE were based on the reported spills from oil exploration and production in the Gulf of Mexico and Pacific OCS regions. BOEMRE used the median spill size in the Gulf of Mexico and Pacific OCS from 1985–1999 as the likely large spill size for analysis purposes. The median size of a large crude oil spill from a pipeline from 1985–1999 on the U.S. OCS was 4,600 barrels, and the average was 6,700 barrels (Anderson and LaBelle 2000). The median large spill size for a platform on the OCS over the entire record from 1964–1999 is 1,500 barrels, and the average is 3,300 barrels (Anderson and LaBelle 2000).

In addition, in their analysis the BOEMRE estimated that large spills are more likely to occur during development and production than during exploration in the Arctic (MMS 2008a). The OSRA model estimated that the statistical mean number of large spills is less than one over the 20-year life of past, present, and reasonably foreseeable developments in the Beaufort Sea (MMS 2008, Table 4.3.2–1). Our oil spill assessment during a 5-year regulatory period was predicated on the same assumptions.

BOEMRE still considers large oil spill estimates for the DEIS of the Beaufort Sea and Chukchi Sea Planning Areas to be valid despite the Deepwater Horizon oil spill event in the summer of 2010. The specifics of the Deepwater Horizon incident are still under investigation. However, geologic and other conditions in the Arctic OCS are substantially different from those in the Gulf of Mexico, including much shallower well depth and the resulting lower pressures, such that BOEMRE currently does not believe that the Deepwater Horizon incident serves as a predictor for the likelihood or magnitude of a very large oil spill event in the Beaufort Sea. Currently, BOEMRE is working on a very large spill estimate for the Arctic OCS in regard to a new methodology developed for ''Notice to Lessees (NTL) No. 2010–N06,'' which rescinded the limitations set forth in 2008 regarding the information lessees and operators were required to provide to MMS (now BOEMRE) on blowout and worst-case discharge scenarios. However, considering the small number of exploratory wells that have occurred in the Beaufort Sea OCS (31 wells since 1982 [BOEMRE 2010b]), the low rate of exploratory drilling blowouts per well drilled, and the low rate of well control incidents that spill fluids, it is reasonable to conclude that the chance of a large spill occurring during OCS exploration drilling in the Beaufort Sea is very small. In addition, it is important to note that Industry does not plan to conduct drilling operations at more than three exploration sites in the Beaufort

Sea OCS for the duration of the 5-year regulatory period.

Between 1971 and 2007, OCS operators have produced almost 15 billion barrels of oil in the United States. During this period, there were 2,645 spills that totaled approximately 164,100 barrels spilled (equal to 0.001 percent of barrels produced), or about 1 barrel spilled for every 91,400 barrels produced. Between 1993 and 2007, the most recent 15-year period analyzed, almost 7.5 billion barrels of oil were produced. During this period, there were 651 spills that totaled approximately 47,800 barrels spilled (equal to 0.0006 percent of barrels produced), or approximately 1 barrel spilled for every 156,900 barrels produced. These numbers will be updated once a final determination of the volume from the Deepwater Horizon spill is adopted.

Within the duration of the previous ITRs, two large onshore terrestrial oil spills occurred as a result of pipeline failures. In the spring of 2006, approximately 6,200 barrels of crude oil spilled from a corroded pipeline operated by BP Exploration (Alaska). The spill impacted approximately 8,100 square meters (2 acres). In November 2009, a spill of approximately 1,150 barrels occurred from a ''common line'' carrying oil, water, and natural gas operated by BP, impacting approximately 780 square meters (8,400 square feet). Neither spill was known to have impacted polar bears, in part due to their locations (both sites were within or near industrial facilities not frequented by bears) and timing (polar bears are not typically observed in the affected areas during the time of the spills and subsequent cleanup).

Trajectory Estimates of a Large Offshore Oil Spill

Although it is reasonable to conclude that the chance of one or more large spills occurring during the period of these regulations on the Alaskan OCS from production activities is low, for the purposes of our analysis, we assume that a large spill will occur in order to evaluate potential impacts to polar bears. The BOEMRE OSRA model analyzes the likely paths of more than two million simulated oil spills in relation to the shoreline and biological, physical, and sociocultural resource areas specific to the Beaufort Sea, which are generically called environmental resource areas (ERAs) or land segments (LSs). The chance that a large oil spill will contact a specific ERA of concern within a given time of travel from a certain location (launch area or pipeline segment) is termed a *conditional probability.* Conditional probabilities assume that no cleanup activities take place and that there are no efforts to contain the spill. We used the BOEMRE OSRA analysis from the Arctic Multi-sale DEIS to estimate the conditional probabilities of a large spill contacting sensitive ERAs pertinent to polar bears.

Oil-Spill Persistence

How long an oil spill persists on water or on the shoreline can vary, depending upon the size of the oil spill, the environmental conditions at the time of the spill, and the substrate of the shoreline. In its large oil spill analysis, BOEMRE assumed that 1,500-barrel and 4,600-barrel spills could last up to 30 days on the water as a coherent slick, based on oil weathering properties and dispersal data specific to North Slope crude oils. Therefore, we assumed that winter spills (October–June) could last up to 180 days as a coherent slick (*i.e.,* if a coherent slick were to freeze into ice over winter, it would melt out as a slick in spring).

We used three BOEMRE launch areas (LAs), LA 8, LA 10, LA 12, and three pipeline segments (PLs), PL 10, PL 11, and PL 12, from Appendix A of the Arctic Multi-sale DEIS (Map A.1–4) to represent the oil spills moving from hypothetical offshore areas. These LAs and PLs were selected because of their close proximity to current offshore facilities.

Oil-Spill-Trajectory Model Assumptions

For purposes of its oil spill trajectory simulation, BOEMRE made the following assumptions:

- All spills occur instantaneously;
- Large oil spills occur in the hypothetical launch areas or along the hypothetical pipeline segments noted above;
- Large spills do not weather for purposes of trajectory analysis. Weathering is calculated separately;
- The model does not simulate cleanup scenarios. The oil spill trajectories move as though no-oil-spill response action is taken; and
- Large oil spills stop when they contact the mainland coastline.

Analysis of the Conditional Probability Results

As noted above, the chance that a large oil spill will contact a specific ERA of concern within a given time of travel from a certain location (LA or PL) assuming a large spill occurs and that no cleanup takes place is termed a *conditional probability.* From the DEIS, Appendix A, we chose ERAs and Land Segments (LSs) to represent areas of concern pertinent to polar bears (MMS 2008a). Those ERAs and LSs, and the conditional probabilities that a large oil spill originating from the launch areas or pipelines chosen are presented in Table 1. From Table 1 we noted the highest chance of contact and the range of chances of contact that could occur should a large spill occur from launch areas or pipeline segments.

TABLE 1—CONDITIONAL OIL SPILL PROBABILITIES (PERCENT) IN REGARD TO ENVIRONMENTAL RESOURCE AREAS (ERAS) AND LAND SEGMENTS (LSS) FOR LAUNCH AREAS (LAS) AND PIPELINES (PLS) OFFSHORE OF FOUR OIL AND GAS INDUSTRY SITES. VALUES IN PARENTHESES ARE FOR PIPELINE SEGMENTS

[* = Less than one-half percent.]

Launch area (pipeline segment)	Season of spill (duration of spill)	ERA 55	ERA 92	ERA 93	ERA 94	ERA 95	ERA 96	ERA 100	LS 85	LS 97	LS 102	LS 107	LS 138	LS 144	LS 145
LA 08 (PL 10)	Summer (60 days).	5(3)	5(8)	*(2)	*(*)	*(*)	1(3)	*(1)	2(1)	1(2)	*(*)	*(*)	*(1)	54(34)	*(*)
	Winter (180 days).	1(1)	2(3)	*(*)	*(*)	*(*)	*(1)	*(*)	2(4)	*(1)	*(*)	*(*)	1(2)	39(29)	*(1)
LA 10 (PL 10)	Summer (60 days).	3(3)	11(8)	2(2)	*(*)	*(*)	4(3)	1(1)	1(1)	5(2)	*(*)	*(*)	2(1)	33(34)	*(*)

TABLE 1—CONDITIONAL OIL SPILL PROBABILITIES (PERCENT) IN REGARD TO ENVIRONMENTAL RESOURCE AREAS (ERAS) AND LAND SEGMENTS (LSS) FOR LAUNCH AREAS (LAS) AND PIPELINES (PLS) OFFSHORE OF FOUR OIL AND GAS INDUSTRY SITES. VALUES IN PARENTHESES ARE FOR PIPELINE SEGMENTS—Continued

[* = Less than one-half percent.]

Launch area (pipeline segment)	Season of spill (duration of spill)	ERA 55	ERA 92	ERA 93	ERA 94	ERA 95	ERA 96	ERA 100	LS 85	LS 97	LS 102	LS 107	LS 138	LS 144	LS 145
	Winter (180 days).	1(1)	2(3)	*(*)	*(*)	*(*)	1(1)	*(*)	3(4)	2(1)	*(*)	*(*)	2(2)	29(29)	1(1)
LA 12 (PL 11)	Summer (60 days).	*(2)	12(12)	7(3)	2(1)	1(*)	13(6)	3(2)	*(*)	7(6)	1(1)	1(1)	9(3)	33(29)	1(*)
	Winter (180 days).	1(1)	11(8)	1(*)	1(*)	*(*)	12(2)	1(*)	3(3)	4(4)	*(*)	*(*)	3(2)	31(28)	2(1)
LA 12 (PL 12)	Summer (60 days).	*(*)	12(9)	7(7)	2(3)	1(1)	13(12)	3(5)	*(*)	7(5)	1(2)	1(3)	9(11)	33(32)	1(1)
	Winter (180 days).	1(1)	11(8)	1(1)	1(1)	*(*)	12(11)	1(1)	3(3)	4(3)	*(1)	*(1)	3(4)	31(30)	2(2)

Definitions of ERAs and LSs, from Tables A.1–13, A.1–20, and A.1–22 (MMS, 2008).
ERA 55: Point Barrow, Plover Islands (Aug–Nov).
ERA 92: Thetis, Jones, Cottle and Return Islands, West Dock (Jan–Dec).
ERA 93: Cross and No Name Island (Aug–Nov).
ERA 94: Maguire Islands, Flaxman Island, Barrier Islands (Jan–Dec).
ERA 95: Arey and Barter Islands and Bernard Spit (Aug–Nov).
ERA 96: Midway, Cross and Bartlett Islands (May–October).
ERA 100: Jago and Tapkaurak Spits (May–October).
Seasonal LS 85: Barrow, Browerville, Elson Lagoon (August–November).
LS 97: Beechey Point, Bertoncini, Bodfish, Cottle and, Jones Islands, Milne Point, Simpson Lagoon.
LS 102: Flaxman Island, Maguire Islands, North Star Island, Point Hopson, Point Sweeney, Point Thomson, Staines River.
LS 107: Bernard Harbor, Jago Lagoon, Kaktovik, Kaktovik Lagoon.
Grouped LS 138: Arctic National Wildlife Refuge (Jan–Dec).
Grouped LS 144: United States Beaufort Coast (Jan–Dec).
Grouped LS 145: Canada Beaufort Coast (Jan–Dec).

Polar bears are most vulnerable to a large oil spill during the open-water period, when bears form aggregations on shore. In the Beaufort Sea, these aggregations often form in the fall near subsistence-harvested bowhead whale carcasses. Specific aggregation areas include Point Barrow, Cross Island, and Kaktovik. In recent years, more than 60 polar bears have been observed feeding on whale carcasses just outside of Kaktovik, and in the autumn of 2002, NSB and Service biologists documented more than 100 polar bears in and around Barrow. In order for significant impacts to polar bears to occur, (1) A large oil spill would have to occur, (2) oil would have to contact an area where polar bears aggregate, and (3) the aggregation of polar bears would have to occur at the same time as the spill. The risk of all three of these events occurring simultaneously is extremely low.

We identified polar bear aggregations in environmental resource areas and non-grouped land segments (ERA 55, 93, 95, 96, 100; LS 85, 107). Assuming a spill occurs during summer or winter, the OSRA estimates the chance of contacting these aggregations is 13 percent or less (Table 1). The OSRA estimates LA12 has the highest chance of a large spill contacting ERA 96 (Midway, Cross, and Bartlett islands). Some polar bears aggregate at these islands during August–October (3 months). If a large oil spill occurred and contacted those aggregation sites outside of that timeframe of use by polar bears, potential impacts to polar bears would be reduced.

Coastal areas, such as the Arctic National Wildlife Refuge (ANWR) and nearshore barrier islands exhibiting relief (containing tundra habitat), provide important denning habitat for polar bears (Amstrup 1993, Amstrup and Gardner 1994, Durner *et al.* 2006, USFWS unpubl. data). Considering that 65 percent of confirmed terrestrial dens found in Alaska from 1981–2005 were on coastal or island bluffs (Durner *et al.* 2006), oiling of such habitats could have negative effects on polar bears, although the specific nature and ramifications of such effects are unknown.

Assuming a large oil spill occurs, and extrapolating the OSRA estimates to tundra relief barrier islands (ERA 92, 93, and 94, LS 97 and 102); these areas have up to a 12 percent chance of a large spill contacting them (with a range of less than 0.5 percent to 12 percent) from LA12 (Table 1). The OSRA estimates suggest that there is an 11 percent chance that oil would contact the coastline of the ANWR (LS 138). The Kaktovik area (ERA 95 and 100, LS 107) has up to a 5 percent chance of spill contact, assuming spills occur during the summer season and contact the coastline within 60 days. The chance of a spill contacting the coast near Barrow (ERA 55, LS 85) would be as high as 5 percent (Table 1).

All barrier islands are important resting and travel corridors for polar bears; larger barrier islands that contain tundra relief are also important denning habitat. Tundra-bearing barrier islands within the geographic region and near oil field development are the Jones Island group of Pingok, Bertoncini, Bodfish, Cottle, Howe, Foggy, Tigvariak, and Flaxman islands. In addition, Cross Island has gravel relief, and polar bears have denned on it. The Jones Island group is located in ERA 92 and LS 97. If a spill were to originate from an LA 8 pipeline segment during the summer months, the probability that this spill would contact these land segments could be as great as 8 percent. The probability that a spill from LA10 would contact the Jones Island group would range from 1 percent to as high as 11 percent. Likewise, for LA 12, PL 11 and the LA 12, PL 12, the range would be from 4 percent to as high as 12 percent and from 3 percent to as high as 12 percent, respectively.

Risk Assessment From Prior Incidental Take Regulations (ITRs)

In previous ITRs, we used a risk assessment method that considered oil spill probability estimates for two sites (Northstar and Liberty), oil spill trajectory models, and a polar bear distribution model based on location of satellite-collared females during September and October (68 FR 66744, November 28, 2003; and 71 FR 43926; August 2, 2006). To support the analysis for this action, we reviewed the previous analysis and used the data to compare the potential effects of a large oil spill in a nearshore production facility (less than 5 miles), such as Liberty, and a facility located further offshore, such as Northstar (greater than 5 miles). Although Liberty was originally designed as an offshore production island, it is currently being developed as a production facility connected to the mainland by a causeway, using ultra-extended-reach technology to drill directionally into the oil prospect. Even though the risk assessment of 2006 did not specifically model spills from the Oooguruk or Nikaitchuq sites, we believed it was reasonable to assume that the analysis for Liberty, and indirectly Northstar, adequately reflected the potential impacts likely to occur from an oil spill at either of these additional locations due to the similarity in the nearshore locations.

Methodology of Prior Risk Assessment

The first step in the risk assessment analysis was to examine oil spill probabilities at offshore production sites for the summer (July–October) and winter (November–June) seasons based on information developed for the original Northstar and Liberty EISs. We assumed that one large spill occurred during the 5-year period covered by the regulations. A detailed description of the methodology can be found at 71 FR 43926. The second step in the risk assessment was to estimate the number of polar bears that could be impacted by a large spill. All modeled polar bear grid cell locations that were intersected by one or more cells of a rasterized spillet path (a modeled group of hundreds of oil particles forming a trajectory and pushed by winds and currents and impeded by ice) were considered 'oiled' by a spill. For purposes of the analysis, if a bear contacted oil, it was assumed to be a lethal contact. Estimating the number of bears contacted by oil involved estimating the distribution of bears that could be in the area and overlapping polar bear distributions and seasonal aggregations with oil spill trajectories. The trajectories previously calculated for Northstar and Liberty sites were used. The trajectories for Northstar and Liberty were provided by the BOEMRE and reported in Amstrup *et al.* (2006). BOEMRE estimated probable sizes of oil spills from a pinhole leak to a rupture in the transportation pipeline. These spill sizes ranged from a minimum of 125 barrels to a catastrophic release event of 5,912 barrels. Researchers set the size of the modeled spill at the scenario of 5,912 barrels, caused by a pinhole or small leak for 60 days under ice without detection.

The second component incorporated polar bear densities overlapped with the oil spill trajectories. To accomplish this, in 2004, USGS completed an analysis investigating the potential effects of hypothetical oil spills on polar bears. Movement and distribution information was derived from radio and satellite relocations of collared adult females. Density estimates were used to determine the distribution of polar bears in the Beaufort Sea. Researchers then created a grid system centered over the Northstar production island and the Liberty site to estimate the number of bears expected to occur within each 1-square-kilometer grid cell. Each of the simulated oil spills were overlaid with the polar bear distribution grid. Finally, the likelihood of occurrence of bears oiled during the duration of the 5-year incidental take regulations was estimated. This was calculated by multiplying the number of polar bears oiled by the spill by the percentage of time bears were at risk for each period of the year.

In summary, the maximum numbers of bears potentially oiled by a 5,912-barrel spill during September open-water seasons from Northstar was 27, and the maximum from Liberty was 23, assuming that a large oil spill occurred and no cleanup or mitigation measures took place. Potentially oiled bears ranged up to 74 and 55 individuals in October mixed-ice conditions for Northstar and Liberty, respectively. Median number of bears oiled by the 5,912-barrel spill from the Northstar simulation site in September and October were 3 and 11 bears, respectively. Median numbers of bears oiled from the Liberty simulation site for September and October were 1 and 3 bears, respectively. Variation occurred among oil spill scenarios and was the result of differences in oil spill trajectories among those scenarios and not the result of variation in the estimated bear densities. For example, in October, 75 percent of trajectories from the 5,912-barrel spill affected 20 or fewer polar bears for spills originating at the Northstar simulation site and 9 or fewer bears for spills originating at the Liberty simulation site.

When calculating the probability that a 5,912-barrel spill would oil 5 or more bears during the annual fall period, we found that oil spills and trajectories were more likely to affect small numbers of bears (fewer than 5 bears) than larger numbers of bears. Thus, for Northstar, the probability of a 5,912-barrel oil spill that would affect (result in the mortality of) 5 or more bears was 1.0–3.4 percent; for 10 or more bears the probability was 0.7–2.3 percent; and for 20 or more bears the probability was 0.2–0.8 percent. For Liberty, the probability of a spill that would cause the mortality of 5 or more bears was 0.3–7.4 percent; for 10 or more bears, the probability was 0.1–0.4 percent; and for 20 or more bears, the probability was 0.1–0.2 percent.

Discussion of Prior Risk Assessment

The location of Industry sites within the marine environment is important when analyzing the potential for polar bears to contact a large oil spill. Simulations from the prior risk assessment suggested that bears have a higher probability of being oiled from facilities located further offshore, such as Northstar. Northstar Island is nearer the active ice zone and in deeper water than Endicott/Liberty, Oooguruk, and Nikaitchuq, areas where higher bear densities were calculated. Furthermore, Northstar is not sheltered by barrier islands. By comparison through modeling, the landfast ice inside the shelter of the barrier islands appeared to dramatically restrict the extent of most oil spills, in contrast to Northstar, which lies outside the barrier islands and in deeper water. However, it should be noted that while oil spreads more in deep water and breaks up faster in deeper waters where wind and wave action are higher, oil persists longer in shallow waters and along the shore.

Based on the simulations, a nearshore island production site (less than 8 km or 5 mi) would potentially involve less risk of polar bears being oiled than a facility located further offshore (greater than 8 km or 5 mi). For any spill event, seasonality of habitat use by bears will be an important variable in accessing risk to polar bears. During the fall season, when a portion of the SBS bear population uses terrestrial sites for aggregating and barrier islands for travel corridors, spill events from nearshore industrial facilities (less than 8 km or 5 mi offshore) may pose more chance of exposing bears to oil due to their persistence in the nearshore

environment. Conversely, during ice-covered and summer seasons, industry facilities located further offshore (greater than 8 km or 5 mi) may increase the chance of bears being exposed to oil, as the bears will be associated with the ice habitat.

Discussion of Polar Bear Aerial Coastal Surveys for Current Analysis

The Service has an ongoing project to monitor polar bear distribution and numbers along the Beaufort Sea coastline during the fall season. Aerial surveys were conducted between 2000 and 2009. From 2000 to 2005, the Service investigated the relationship between sea-ice conditions, food availability, and the fall distribution of polar bears in terrestrial habitats of the SBS via weekly aerial surveys. Aerial surveys were conducted weekly during September and October along the SBS coastline and barrier islands between Barrow and the Canadian border to determine polar bear density during the peak use of terrestrial habitat by bears. The Service observed that the number of bears on land increased when sea-ice retreated farthest from the shore. The distribution of bears also appeared to be influenced by the availability of subsistence-harvested bowhead whale carcasses and the density of ringed seals in offshore waters.

Between 2000 and 2005, the maximum density estimate of bears observed during any single survey was 8.6 bears/100 km (62 mi), or 122 bears total. Across all years (2000 to 2005) and survey dates between mid-September and the end of October, an average of 4 bears/100 km (62 mi), or 57 bears total, were observed. The Service estimated that a maximum of 8.0 percent and an average of 3.7 percent of the estimated 1,526 bears in the SBS population were observed on land during the late open-water and broken-ice period. This period coincides with increased aggregations of bears in the nearshore at feeding sites and the peak observation period (August through October) of bears observed by Industry as reported through their bear monitoring programs. This would likely be the period posing the greatest risk to the largest number of bears from an oil spill.

The number of bears observed per kilometer of survey flown was higher between Cape Halkett and Jago Spit (4 bears/100 km [62 mi]) than the area surveyed between Barrow and the Canadian border (3 bears/100 km [62 mi]) during the 2003–2005 surveys. The Service reported that this difference was largely driven by a major concentration of bears (69 percent of total bears onshore) at Barter Island (17.0 polar bears/100 km [62 mi]). In addition, annual surveys were also conducted in 2007, 2008, and 2009. The number of bears observed during weekly surveys ranged between 2 to 51, 2 to 78, and 7 to 75, respectively. The highest concentrations continued to be in the area of Barter Island and the community of Kaktovik. Using the above information, if a spill occurred during the fall open-water or broken-ice period, up to 8 percent of the SBS population could potentially contact oil.

Conclusion of Risk Assessment

In summary, documented oil-spill-related impacts in the marine environment to polar bears to date in the Beaufort Sea by the oil and gas Industry are minimal. To date, no large spills by Industry in the marine environment have occurred in Arctic Alaska. Nevertheless, the possibility of oil spills from Industry activities and the subsequent impacts on polar bears that contact oil remain a major concern.

There has been much discussion about effective techniques for containing, recovering, and cleaning up oil spills in Arctic marine environments, particularly the concern that effective oil spill cleanup during poor weather and broken-ice conditions has not been proven. Given this uncertainty, limiting the likelihood of a large oil spill becomes an even more important consideration. Industry oil-spill contingency plans describe methodologies in place to prevent a spill from occurring. For example, all current offshore production facilities have spill containment systems in place at the well heads. In the event that an oil discharge should occur, containment systems are designed to collect the oil before it contacts the environment.

With the limited background information available regarding oil spills in the Arctic environment, it is unknown what the outcome of such a spill event would be if one were to occur. Polar bears could encounter oil spills during the open-water and ice-covered seasons in offshore or onshore habitat. Although the majority of the SBS polar bear population spends a large amount of their time offshore on the pack ice, it is likely that some bears would encounter oil from a large spill that persisted for 30 days or more.

Although the extent of impacts from a large oil spill would depend on the size, location, and timing of spills relative to polar bear distributions and on the effectiveness of spill response and cleanup efforts, under some scenarios, population-level impacts could be expected. A large spill originating from a marine oil platform could have significant impacts on polar bears if an oil spill contacted an aggregation of polar bears. Likewise, a spill occurring during the broken-ice period could significantly impact the SBS polar bear population, in part because polar bears may be more active during this season.

In the event that an offshore oil spill contacted numerous bears, a potentially significant impact to the SBS population could result, initially to the percentage of the population directly contacted by oil, but impacts could likely affect a much larger portion of the population. This effect would be magnified in and around areas of polar bear aggregations. Bears could also be affected indirectly either by food contamination or by chronic lasting effects caused by exposure to oil. During the 5 year period of these regulations, however, the chance of a large spill occurring is extremely low.

While there is uncertainty in the analysis, certain vectors have to align for polar bears to be impacted by a large oil spill occurring in the marine environment. First, a large spill has to occur. Second, the large spill has to contact areas where bears may be located. Assuming that a large spill occurs, BOEMRE's most recent OSRA estimated that there is as much as a 13 percent chance that a large spill from the analyzed sites (LAs 8, 10, 12, and PLs 10, 11, 12), would contact Cross Island (ERA 96) within 60 days during summer and as much as an 11 percent chance that it would contact Barter Island and/or the coast of the ANWR (ERA 95 and 100, LS 107 and 138). Similarly, there is as much as a 5 percent chance that an oil spill would contact the coast near Barrow (ERA 55, LS 85). Third, polar bears would have to be seasonally distributed within the affected region when the oil is present. Data from the polar bear coastal surveys suggested that while polar bears are not uniformly distributed, an average of 3.7 percent, with a maximum of 8 percent (sample size of 122 bears), of the estimated 1,526 bears in the SBS population were distributed along the Beaufort Sea coastline between the Alaska/Canada border and Barrow.

As a result of the information considered here, the Service concludes that the probability of an offshore spill from an offshore production facility in the next 5 years is low. Moreover, in the unlikely event of a large spill, the probability that spills would contact areas or habitat important to bears appears low. Third, while individual bears could be affected by a spill, the potential for a population-level effect would be minimal unless the spill

contacted an aggregation of bears. Known polar bear aggregations tend to be seasonal during the late open-water and broken-ice season, further minimizing the potential of a spill to impact bears. Therefore, we conclude that only small numbers of polar bears are likely to be affected by a large oil spill (greater than 1,000 barrels) in the Arctic waters, with only a negligible impact to the SBS population.

Documented Impacts of the Oil and Gas Industry on Pacific Walruses and Polar Bears

In order to document potential impacts to polar bears and walruses, we analyzed potential effects that could have more than a negligible impact to both species. The effects analyzed included the loss or preclusion of habitat, lethal take, harassment, and oil spills.

Pacific Walrus

During the history of the incidental take regulations, the actual impacts of Industry activities on Pacific walruses, documented through monitoring, were minimal. From 1994 to 2004, Industry recorded nine sightings, involving a total of ten Pacific walruses, during the open-water season. From 2005 to 2009, an additional eight individual walruses were observed during Industry operations in the Beaufort Sea. In most cases, walruses appeared undisturbed by human interactions; however, three sightings during the early 2000s involved potential disturbance to the walruses. Two of three sightings involved walruses hauling out on the armor of Northstar Island, and one sighting occurred at the SDC on the McCovey prospect, where the walruses reacted to helicopter noise. With the additional sightings in the Beaufort Sea, walruses were observed during exploration (eight sightings; five during recent aerial surveys; 2009), development (three sightings), and production (six sightings) activities. There is no evidence that there were any physical effects or impacts to these individual walruses based on the interaction with Industry. We know of no other interactions that occurred between walrus and Industry during the duration of the incidental take program. Furthermore, there have been no other documented impacts to walruses from Industry.

Cumulative Impacts

Pacific walruses do not normally range into the Beaufort Sea, and documented interactions between oil and gas activities and walruses have been minimal. Industry activities identified by the petitioners are likely to result in some incremental cumulative effects to the small number of walruses exposed to these activities through the potential exclusion or avoidance of walruses from resting areas and disruption of associated biological behaviors. However, based on the habitat use patterns of walruses and their close association with seasonal pack ice, relatively small numbers of walruses are likely to be encountered during the open-water season when marine activities are expected to occur. Required monitoring and mitigation measures designed to minimize interactions between authorized projects and concentrations of resting or feeding walruses are also expected to limit the severity of any behavioral responses. As a population, hunting pressure, climate change, and the expansion of commercial activities into walrus habitat all have potential to impact walruses. Combined, these factors are expected to present significant challenges to future walrus conservation and management efforts. However, we conclude that exploration activities, especially as mitigated through the regulatory process, are not expected to add significantly to the cumulative impacts on the Pacific walrus population from past, present, and future activities that are reasonably likely to occur within the 5-year period covered by these regulations.

Polar Bear

Documented impacts on polar bears by the oil and gas Industry during the past 40 years appear to be minimal. Historically, polar bears have spent a limited amount of time on land, coming ashore to feed, den, or move to other areas. With the changing of their distribution based on the changing ice environment, the Service anticipates that bears will remain on land longer. At times, fall storms deposit bears along the coastline, where the bears remain until the ice returns. For this reason, polar bears have mainly been encountered at or near most coastal and offshore production facilities, or along the roads and causeways that link these facilities to the mainland. During those periods, the likelihood of interactions between polar bears and Industry activities increases. We have found that the polar bear interaction planning and training requirements set forth in these regulations and required through the LOA process have increased polar bear awareness and minimized the number of these encounters. LOA requirements have also increased our knowledge of polar bear activity in the developed areas.

No known lethal take associated with Industry has occurred during the period covered by incidental take regulations. Prior to issuance of regulations, lethal takes by Industry were rare. Since 1968, there have been two documented cases of lethal take of polar bears associated with oil and gas activities. In both instances, the lethal take was reported to be in defense of human life. In winter 1968–1969, an Industry employee shot and killed a polar bear. In 1990, a female polar bear was killed at a drill site on the west side of Camden Bay. In contrast, 33 polar bears were killed in the Canadian Northwest Territories from 1976 to 1986 due to encounters with Industry. Since the beginning of the incidental take program, which includes measures that minimize impacts to the species, no polar bears have been killed due to encounters associated with current Industry activities on the North Slope. For this reason, Industry has requested that these regulations cover only nonlethal, incidental take.

To date, most impacts to polar bears from industry operations have been the result of direct bear–human encounters, some of which have led to deterrence events. Monitoring efforts by Industry required under previous regulations for the incidental take of polar bears documented various types of interactions between polar bears and Industry. Between 2006 and 2009, a total of 73 LOAs have been issued to Industry, with an average of 18 LOAs annually. Not all Industry activities result in the observation of, or interaction with, polar bears. Polar bear observations were recorded for 56 percent of the LOAs (41 of 73 LOAs).

From 2006 through 2009, an average of 306 polar bears was observed and reported per year (with a range of 170 to 420 bears annually). During 2007, during 177 sightings, 7 companies observed 321 polar bears. In 2008, during 186 sightings, 10 companies observed 313 polar bears. In 2009, during 245 sightings, 420 polar bears were observed. In all 3 years, the highest number of bears observed was recorded in the fall season in August and September. In 2007, the highest number of bears was recorded in August, where 90 sightings totaling 148 bears were documented; in August 2008, 87 sightings totaling 162 bears were recorded; while in 2009, bear sightings were reported 77 times. Sightings of polar bears have increased since previous regulatory time periods due to a combination of variables. The high number of bear sightings for these years was most likely the result of an increased number of bears using the terrestrial habitat as a result of changes

in sea-ice habitat, multiple marine-based projects occurring near barrier islands (where multiple sightings were reported), and increased compliance and monitoring of Industry projects, especially during August and September, where some repeat sightings of individual bears and family groups occurred. This trend in observations is consistent with the hypothesis of increasing use of coastal habitats by polar bears during the summer months.

Industry activities that occur on or near the Beaufort Sea coast continue to have the greatest potential for encountering polar bears, as opposed to Industry activities occurring inland. According to AOGA figures, the offshore facilities of Endicott, Liberty, Northstar, and Oooguruk accounted for 47 percent of all bear observations between 2005 and 2008 (182 of 390 sightings).

Intentional take of polar bears (through separate Service authorizations under sections 101(a)(4)(A), 109(h), and 112(c) of the MMPA) occurs on the North Slope as well. Intentional take is used as a mitigation measure to allow citizens conducting activities in polar bear habitat to take polar bears by harassment (nonlethal deterrence activities) for the protection of both human life and polar bears. The Service recognizes intentional take as an escalation of an incidental take, where the purpose of the intentional take authorization is to ''take'' polar bears by noninjurious deterrent activities prior to a bear–human encounter escalating to the use of deadly force against a polar bear. These MMPA-specific authorizations have proven to be successful in preventing injury and death of humans and polar bears.

The Service provides guidance and training on the appropriate harassment response necessary for polar bears. The largest operator on the North Slope, BPXA, has documented an increase in the total number of bear observations for their oil units since 2006 (39, 62, 96, and 205 bears for the years 2006, 2007, 2008, and 2009, respectively). However, the percentage of Level B deterrence events reported by BPXA has decreased from 64 percent in 2006 to 21 percent in 2009 of total observations. BPXA attributes this decrease to an increase in polar bear awareness and deterrence training of personnel. A similar trend appears in the slope-wide data presented by AOGA, which represent multiple operators. The percentage of Level B deterrence events has decreased from 39 percent of all reported polar bear sightings in 2005 to 23 percent in 2008. We currently have no indication that these encounters, which alter the behavior and movement of individual bears, have an effect on survival and recruitment in the SBS polar bear population.

Cumulative Impacts

Cumulative impacts of oil and gas activities are assessed, in part, through the information we gain in monitoring reports, which are required for each operator under the authorizations. Incidental take regulations have been in place in the Arctic oil and gas fields for the past 17 years. Information from these reports provides a history of past effects on polar bears from interactions with oil and gas activities, including intentional take. Information on previous levels of impact is used to evaluate impacts from existing and future Industry activities and facilities. In addition, information used in our cumulative effects assessment includes: polar bear research leading to publications and data, such as polar bear population assessments by USGS; information from legislative actions, including the listing of the polar bear as a threatened species under the ESA in 2008; traditional knowledge of polar bear habitat use; anecdotal observations; and professional judgment.

While the number of LOAs being requested does not represent the potential for direct impact to polar bears, it does offer an index of the effort and type of Industry work that is currently being conducted. LOA trend data also help the Service track progress on various projects as they move through the stages of oil field development. An increase in slope-wide projects has the ability to expose more people to the Arctic and to increase bear–human interactions.

The Polar Bear Status Review describes cumulative effects of oil and gas development on polar bears in Alaska (see pages 175 to 181 of the status review). This document can be found at http://*http://www.regulations.gov;* search for Docket No. FWS–R7–FHC–2010–0098. In addition, in 2003 the National Research Council published a description of the cumulative effects that oil and gas development would have on polar bears and seals in Alaska. They concluded the following:

(1) ''Industrial activity in the marine waters of the Beaufort Sea has been limited and sporadic and likely has not caused serious cumulative effects to ringed seals or polar bears.''

(2) ''Careful mitigation can help to reduce the effects of oil and gas development and their accumulation, especially if there is no major oil spill. However, the effects of full-scale industrial development off the North Slope would accumulate through the displacement of polar bears and ringed seals from their habitats, increased mortality, and decreased reproductive success.''

(3) ''A major Beaufort Sea oil spill would have major effects on polar bears and ringed seals.''

(4) ''Climatic warming at predicted rates in the Beaufort and Chukchi sea regions is likely to have serious consequences for ringed seals and polar bears, and those effects will accumulate with the effects of oil and gas activities in the region.''

(5) ''Unless studies to address the potential accumulation of effects on North Slope polar bears or ringed seals are designed, funded, and conducted over long periods of time, it will be impossible to verify whether such effects occur, to measure them, or to explain their causes.''

A detailed description of climate change and its potential effects on polar bears, prepared by the Service, can be found in the ''Polar Bear Status Review'' (pages 72 to 108) at: *http://www.regulations.gov;* search for Docket No. FWS–R7–FHC–2010–0098. Additional detailed information from USGS regarding the status of the SBS stock in relation to climate change, projections of habitat and populations, and forecasts of rangewide status can be found at: *http://www.usgs.gov/newsroom/special/polar_bears/*. Climate change could alter polar bear habitat because seasonal changes, such as an extended duration of open water, may preclude sea-ice habitat and restrict some bears to coastal areas. Biological effects on the worldwide population of polar bears are expected to include increased movements, changes in bear distributions, changes in access to and the allocation of denning areas, increased energy expenditure from open-water swimming, and possible decreased fitness. Demographic effects that may occur due to climate change include changes in prey availability to polar bears, a potential reduction in the access to prey, and changes in seal productivity.

The Service anticipates negligible effects on polar bears due to Industry activity, even though there may be an increased use of terrestrial habitat in the fall period by polar bears on the coast of Alaska and an increased use of terrestrial habitat by denning bears in the same area. Polar bears are not residents of the oil fields but rather use the habitat in a transitory way, which limits potential impacts from Industry. Furthermore, no known Level A harassment or lethal takes of polar bears have occurred throughout the duration

of the incidental take program, which was initiated in 1994. The last known Industry-caused death of a bear by Industry occurred in 1990. This documented information suggests that Industry will have no more than a negligible effect on polar bears for the 5-year regulatory period, even though there may be more bears onshore. The Service also believes that required mitigation measures will be effective in minimizing any additional effects attributed to seasonal shifts in distributions of the increased use by bears of terrestrial habitats and denning polar bears during the 5-year timeframe of the regulations, as has occurred in the past. It is likely that, due to potential seasonal changes in the abundance and distribution of polar bears during the fall, more frequent encounters may occur, and Industry may have to implement mitigation measures more often (*e.g.,* the number of polar bear deterrence events may increase). In addition, if additional polar bear den locations are detected within industrial activity areas, spatial and temporal mitigation measures, including cessation of activities, may be instituted more frequently during the 5-year period of the rule.

The activities identified by Industry are likely to result in incremental cumulative effects on polar bears during the 5-year regulatory period. Based on Industry monitoring information, for example, deflection from travel routes along the coast, where bears move around coastal facilities rather than traveling through them, appears to be a common occurrence. Incremental cumulative effects could also occur through the potential exclusion or temporary avoidance of polar bears from feeding, resting, or denning areas and the disruption of associated biological behaviors. However, based on monitoring results acquired from past ITRs, the level of cumulative effects, including those of climate change, during the 5-year regulatory period would result in negligible effects on the bear population.

Monitoring results from Industry, analyzed by the Service, indicate that little or no short-term impacts on polar bears have resulted from oil and gas activities. We evaluated both subtle and acute impacts likely to occur from industrial activity and determined that all direct and indirect effects, including cumulative effects, of industrial activities have not adversely affected the species through effects on rates of recruitment or survival. Past monitoring reports indicate that the level of interaction between Industry and polar bears has been minimal. Additional information, such as subsistence harvest levels and incidental observations of polar bears near shore, provide evidence that these populations have not been adversely affected. For the next 5 years, we anticipate that the level of oil and gas Industry interactions with polar bears will likely increase in response to increased numbers of bears on shore and increased activity along the coast; however, we do not anticipate that significant impacts on bears will occur.

Summary of Take Estimates for Pacific Walruses and Polar Bears

Small Numbers Determination

As discussed in the ''Biological Information'' section, the dynamic nature of sea-ice habitat influences the seasonal and annual distribution and abundance of polar bears and walruses in the specified geographical region. The following analysis concludes that only small numbers of Pacific walruses and polar bears are likely to be taken incidental to the described Industry activities relative to the number of walruses and polar bears that are expected to be unaffected by those activities. This conclusion is based upon known distribution patterns and habitat use of Pacific walruses and polar bears.

1. *The number of polar bears and walruses utilizing the described geographic region during Industry operations is expected to be small relative to the number of animals in the respective populations utilizing pack-ice habitats in the Beaufort and Chukchi Seas for polar bears or the Chukchi and Bering Seas habitats for the Pacific walrus.* As stated before, the Pacific walrus is extralimital in the Beaufort Sea, since the majority of the walrus population is found exclusively in the Chukchi and Bering seas. There is no expectation that even discrete movements, such as foraging, by some individual walruses into the Beaufort Sea as a result of climate change will increase the number of walruses observed by Industry during the regulatory period.

Polar bears are expected to remain closely associated with either the sea ice or coastal zones throughout the year on the North Slope of Alaska. As a result of coastal surveys, the Service estimates that a maximum of 8.0 percent and an average of 3.7 percent of the estimated 1,526 bears in the SBS population have been observed on land during the late open-water and broken-ice period. This period coincides with the peak period (August through October) of observations of bears by Industry, as reported through their bear monitoring programs. If not all bears were counted, this suggests that at the peak of terrestrial habitat use in early fall prior to freeze-up, up to 10 percent of the SBS polar bear population can be found near the coastal environments, while 90 percent of the bears continue to be associated with the existing pack ice.

2. *Within the specified geographical region, the footprint of authorized projects is expected to be small relative to the range of polar bear and walrus in the region.* Again, the fact that the Pacific walrus is extralimital to the Beaufort Sea suggests that any marine operations conducted in the geographic area will have minimal walrus interactions within the geographic region. Indeed, only 9 walruses have been sighted in the course of Industry operations since 1994.

Polar bears range well beyond the boundaries of the geographic region of these regulations (approximately 280,000 square kilometers or 68.9 million acres) and are transient through the regions of Industry infrastructure. As reported by AOGA, the total infrastructure area on the North Slope as of 2007 was 73 square kilometers (18,129 acres), which is a small proportion of the requested geographic region.

3. *Monitoring requirements and adaptive mitigation measures are expected to significantly limit the number of incidental takes of animals.* Holders of an LOA will be required to adopt monitoring requirements and mitigation measures designed to reduce potential impacts of their operations on walruses and polar bears. Monitoring programs are required to inform operators of the presence of polar bears or walrus. Adaptive management responses based on real-time monitoring information (described in these regulations) will be used to avoid or minimize interactions with walruses and polar bears. For Industry activities in terrestrial environments, where denning polar bears may be a factor, mitigation measures will require that den detection surveys be conducted, and Industry will maintain at least a 1-mile distance from any known polar bear den. A full description of the mitigation, monitoring, and reporting requirements associated with an LOA, which will be requirements for Industry, can be found in 50 CFR 18.128. Note that we have removed paragraph (iv) at § 18.128(a)(3) in the proposed rule from this final rule as this paragraph is not relevant for the specified geographic region for this rule and was added inadvertently.

We expect that only a small proportion of the Pacific walrus

population or the CS and SBS polar bear populations will likely be impacted by any individual project because: (1) Only small numbers of walruses or polar bears will occur in the marine or terrestrial environments where Industry activities will occur; (2) only small numbers will be impacted because walrus are extralimital in the Beaufort Sea and polar bears are widely distributed throughout their expansive range, which encompasses area outside of the geographic region of the regulations; and (3) the monitoring requirements and mitigation measures described below that will be imposed on Industry will further reduce impacts.

Negligible Effects Determination

Based upon our review of the nature, scope, and timing of oil and gas activities and mitigation measures, and in consideration of the best available scientific information, we have determined that these activities will have a negligible impact on Pacific walrus and on polar bears. Factors considered in our negligible effects determination include:

1. *The behavior and distribution of walruses and polar bears utilizing areas that overlap with Industry is expected to limit the amount of interactions between walruses, polar bears, and Industry.* The distribution and habitat use patterns of walruses and polar bears in conjunction with the likely area of Industrial activity results in relatively few animals in the area of operations and, therefore, that are likely to be affected. As discussed in the section ''Biological Information'' (see Pacific Walrus section), only small numbers of walruses are likely to be found in Beaufort Sea open-water habitats where offshore Industry activities will occur.

Throughout the year, polar bears are closely associated with pack ice and are unlikely to interact with open-water industrial activities for the same reasons discussed in the Small Numbers Determination. Likewise, polar bears from the SBS and CS populations are widely distributed and range outside of the geographic region of these regulations. In addition, through fall coastal surveys we estimated that only a small proportion of the SBS population, approximately 8–10 percent, is distributed along the coastal areas during the late-summer-early-fall season.

2. *The predicted effects of Industry activities on walruses and polar bears will be nonlethal, temporary, passive takes of animals.* The documented impacts of previous Industry activities on walruses and polar bears, taking into consideration cumulative effects, provide direct information that the types of activities analyzed for this rule will have minimal effects and will be short-term, temporary behavioral changes.

3. *The footprint of authorized projects is expected to be small relative to the range of polar bear and walrus populations.* As with the small numbers determination, this factor will also help minimize negligible effects of Industry on Pacific walrus and polar bears. A limited area of activity will reduce the potential exposure of animals to Industry activities and limit potential interactions of those animals using the area, such as walruses feeding in the area or polar bears or walruses moving through the area.

4. *Mitigation measures will limit potential effects of industry activities.* As described in the Small Numbers Determination, holders of an LOA will be required to adopt monitoring requirements and mitigation measures designed to reduce potential impacts of their operations on walruses and polar bears. Seasonal restrictions, monitoring programs required to inform operators of the presence of marine mammals and environmental conditions, den-detection surveys for polar bears, and adaptive management responses based on real-time monitoring information (described in these regulations) will be used to avoid or minimize interactions with polar bears and walruses and, thereby, limit Industry effects on these animals.

5. *The potential impacts of climate change for the duration of the regulations (2011–2016) have the potential to displace polar bears and walruses from the geographic region and during the season of Industry activity.* Climate change is likely to result in significant impacts to polar bear and walrus populations in the future. Recent models indicate that the persistence of Alaska's polar bear stocks are in doubt, and that they will possibly disappear within 50 to 100 years due to the changing Arctic ice conditions as a result of climate change. Recent trends in the Arctic have resulted in seasonal sea-ice retreat off the continental shelf and over deep Arctic Ocean waters, presenting significant adaptive challenges to walruses. Reasonably foreseeable impacts to the Pacific walrus population as a result of diminishing sea-ice cover include: shifts in range and abundance, possibly into the Beaufort Sea; increased reliance on coastal haulouts in the Chukchi Sea; and increased mortality associated with predation and disturbance events at coastal haulouts.

Although climate change is a pressing conservation issue for ice-dependent species, such as polar bears and walruses, we have concluded that the activities by Industry addressed in this 5-year rule will not adversely impact the survival of these species. Near-term climate-driven change (retreat of sea ice) will likely result in each species utilizing areas, such as coastal haulouts by walrus and the ice shelf by a continued majority of the polar bear population, outside of the geographic region and areas of Industrial activity. While the Service suspects that a certain portion of the bear population using coastal habitats (currently 8–10 percent of the SBS population) will increase and associate with terrestrial habitats longer, the types of effects as a result of Industry interaction will be short-term behavioral changes.

We, therefore, conclude that any incidental take reasonably likely to or reasonably expected to occur as a result of carrying out any of the activities authorized under these regulations will have no more than a negligible effect on polar bears and Pacific walruses using the Beaufort Sea region, and we do not expect any resulting disturbances to negatively impact the rates of recruitment or survival for the polar bears and Pacific walrus populations. These regulations do not authorize lethal take, and we do not anticipate that any lethal take will occur.

Findings

We make the following findings regarding this action:

Small Numbers

Pacific Walrus.

Pacific walruses are extralimital in the SBS and, hence, there is a very low probability that Industry activities, including offshore drilling operations, seismic activities, and coastal activities, will adversely affect the Pacific walrus population. Given the low numbers in the region, we anticipate that no more than a small number of walruses are likely to be taken during the length of this rule. We do not anticipate the potential for any lethal take from normal Industry activities. Therefore, we do not anticipate any detrimental effects on recruitment or survival.

We estimate that the projected number of takes of Pacific walruses by Industry will be no more than 10 takes by harassment per year. Takes will be Level B harassment, manifested as short-term behavioral changes. This take estimate is based on historic Industry monitoring observations. Based on the projected level of exploration activity, it is unlikely that the number of takes will

increase significantly in the next 5 years.

Polar Bear

Standard operating conditions for Industry exploration, development, and production activities have the potential to incidentally take polar bears. Recent reporting data from the current ITRs indicate that an annual average of 306 polar bears have been observed during Industry activities. Some of these observations are likely sightings of the same bears due to the inability to distinguish between animals in some observations. While the majority of observations are sightings where no interaction between bears and Industry occurs (81 percent of all bear observations from 2006 to 2009: USFWS unpubl. data), takes by harassment do occur. Takes by harassment can be described as either: (1) Deterrence events (15 percent of all bear observations from 2006 to 2009: USFWS unpubl. data); and (2) those occasions when there is clear evidence that the bear's behavior has been altered through events other than deterrence (4 percent of all bear observations from 2006 to 2009: USFWS unpubl. data).

Small takes of this nature are allowed through LOAs. According to industry monitoring data, the number of Level B takes (deterrence events and behavioral change events), averaged 66 occurrences per year from 2006 to 2009 (67 takes in 2006, 64 takes in 2007, 33 takes in 2008, and 101 takes in 2009).

Using these data, we anticipate that the total number of takes of polar bears by all Level B harassment events will not exceed 150 per year. All anticipated takes will be nonlethal Level B harassment, involving only temporary changes in bear behavior. The required mitigation and monitoring measures described in the regulations are expected to prevent injurious Level A takes. The number of lethal takes is projected to be zero. We do not expect the total of these disturbances to affect rates of recruitment or survival in the SBS polar bear population.

Negligible Impact

Based on the best scientific information available, the results of monitoring data from our previous regulations (16 years of monitoring and reporting data), the review of the information generated by the listing of the polar bear as a threatened species and the designation of polar bear critical habitat, the ongoing analysis of the petition to list the Pacific walrus as a threatened species under the ESA, the results of our modeling assessments, and the status of the population, we find that any incidental take reasonably likely to result from the effects of oil- and gas-related exploration, development, and production activities during the period of the rule, in the Beaufort Sea and adjacent northern coast of Alaska, will have no more than a negligible impact on polar bears and Pacific walruses. In making this finding, we considered the following:

(1) The distribution of the species (through 10 years of aerial surveys and studies of feeding ecology, and a regression analysis of pack ice position and polar bear distribution);

(2) The biological characteristics of the species (through bio-monitoring for toxic chemicals, studies of den site behavior, radio-telemetry data);

(3) The nature of oil and gas Industry activities;

(4) The potential effects of Industry activities and potential oil spills on the species;

(5) The probability of oil spills occurring;

(6) The documented impacts of Industry activities on the species, taking into consideration cumulative effects (through FLIR surveys, the use of trained dogs to detect occupied dens, a bear–human conflicts workshop, a study assessing sound levels and of industrial noise and potential noise and vibration exposure for dens, and data mapping den habitat);

(7) The potential impacts of climate change, where both walruses and polar bears can potentially be displaced from preferred habitat;

(8) Mitigation measures designed to minimize Industry impacts through adaptive management; and

(9) Other data provided by Industry monitoring programs in the Beaufort and Chukchi Seas.

We also considered the specific Congressional direction in balancing the potential for a significant impact with the likelihood of that event occurring. The specific Congressional direction that justifies balancing probabilities with impacts follows:

> If potential effects of a specified activity are conjectural or speculative, a finding of negligible impact may be appropriate. A finding of negligible impact may also be appropriate if the probability of occurrence is low but the potential effects may be significant. In this case, the probability of occurrence of impacts must be balanced with the potential severity of harm to the species or stock when determining negligible impact. In applying this balancing test, the Service will thoroughly evaluate the risks involved and the potential impacts on marine mammal populations. Such determination will be made based on the best available scientific information [53 FR 8474, March 15, 1988; 132 Cong. Rec. S 16305 (October. 15, 1986)].

Pacific walruses are only occasionally found during the open-water season in the Beaufort Sea. The Beaufort Sea polar bear population is widely distributed throughout its range. A small percentage (less than 10 percent) of the SBS polar bear population typically occurs in coastal and nearshore areas where most Industry activities take place.

We reviewed the effects of the oil and gas Industry activities on polar bears and Pacific walruses, including impacts from noise, physical obstructions, human encounters, and oil spills. Based on our review of these potential impacts, past LOA monitoring reports, and the biology and natural history of Pacific walrus and polar bear, we conclude that any incidental take reasonably likely to or reasonably expected to occur as a result of projected activities will have a negligible impact on polar bear and Pacific walrus populations. Furthermore, we do not expect these disturbances to affect the rates of recruitment or survival for the Pacific walrus and polar bear populations. These regulations do not authorize lethal take, and we do not anticipate any lethal take will occur.

The probability of an oil spill that will cause significant impacts to Pacific walruses and polar bears appears to be extremely low. We have included potential spill information from Oooguruk, Nikaitchuq, Northstar, and Endicott/Liberty offshore projects in our oil spill analysis to analyze multiple offshore sites. We have analyzed the likelihood of an oil spill in the marine environment of the magnitude necessary to kill a significant number of polar bears for offshore projects and, through a risk assessment analysis, found that it is unlikely that there will be any lethal take. In the unlikely event of a catastrophic spill, we will take immediate action to minimize the impacts to these species and reconsider the appropriateness of authorizations for incidental taking through section 101(a)(5)(A) of the MMPA.

After considering the cumulative effects of existing and future development, production, and exploration activities, and the likelihood of any impacts, both onshore and offshore, we find that the total expected takings resulting from oil and gas Industry activities will affect no more than small numbers and will have no more than a negligible impact on the SBS polar bear and Pacific walrus populations inhabiting the Beaufort Sea area on the North Slope coast of Alaska.

Our finding of ''negligible impact'' applies to incidental take associated with the petitioner's oil and gas

exploration, development, and production activities as mitigated through the regulatory process. The regulations establish monitoring and reporting requirements to evaluate the potential impacts of authorized activities, as well as mitigation measures designed to minimize interactions with and impacts to walruses and polar bears. We will evaluate each request for an LOA based on the specific activity and the specific geographic location where the proposed activities are projected to occur to ensure that the level of activity and potential take is consistent with our finding of negligible impact. Depending on the results of the evaluation, we may grant the authorization, add further operating restrictions, or deny the authorization.

Conditions are attached to each LOA. These conditions minimize interference with normal breeding, feeding, and possible migration patterns to ensure that the effects to the species remain negligible. The conditions include the following stipulations: (1) These regulations do not authorize intentional taking of polar bears or Pacific walruses or lethal incidental take; (2) for the protection of pregnant polar bears during denning activities (den selection, birthing, and maturation of cubs) in known denning areas, Industry activities may be restricted in specific locations during specified times of the year; and (3) each activity covered by an LOA requires a site-specific plan of operation and a site-specific polar bear interaction plan. We may add additional measures depending upon site-specific and species-specific concerns. Restrictions in denning areas will be applied on a case-by-case basis after assessing each LOA request and may require pre-activity surveys (*e.g.,* aerial surveys, FLIR surveys, or polar bear scent-trained dogs) to determine the presence or absence of denning activity and, in known denning areas, may require enhanced monitoring or flight restrictions, such as minimum flight elevations, if necessary. We will analyze the required plan of operation and interaction plans to ensure that the level of activity and possible take are consistent with our finding that total incidental takes will have a negligible impact on polar bear and Pacific walruses and, where relevant, will not have an unmitigable adverse impact on the availability of these species for subsistence uses.

We have evaluated climate change in regard to polar bears and walruses. Although climate change is a worldwide phenomenon, it was analyzed as a contributing effect that could alter polar bear and walrus habitat and behavior. Climate change could alter polar bear habitat because seasonal changes, such as extended duration of open water, may preclude sea-ice habitat use and restrict some bears to coastal areas. The reduction of sea-ice extent, caused by climate change, may also affect the timing of polar bear seasonal movements between the coastal regions and the pack ice. If the sea ice continues to recede as predicted, it is hypothesized that polar bears may spend more time on land rather than on sea ice, similar to what has been recorded in the Hudson Bay. Climate change could also alter terrestrial denning habitat through coastal erosion brought about by accelerated wave action. The challenge in the Beaufort Sea will be to predict changes in ice habitat, barrier islands, and coastal habitats in relation to changes in polar bear distribution and use of habitat.

Within the described geographic region of this rule, Industry effects on Pacific walruses and polar bears are expected to occur at a level similar to what has taken place under previous regulations. We anticipate that there will be an increased use of terrestrial habitat in the fall period by polar bears. We also anticipate a slight increased use of terrestrial habitat by denning bears. Nevertheless, we expect no significant impact to these species as a result of these anticipated changes. The mitigation measures will be effective in minimizing any additional effects attributed to seasonal shifts in distribution or denning polar bears during the 5-year timeframe of the regulations. It is likely that, due to potential seasonal changes in abundance and distribution of polar bears during the fall, more frequent encounters may occur and that Industry may have to implement mitigation measures more often (*e.g.,* the number of polar bear deterrence events may increase). In addition, if additional polar bear den locations are detected within industrial activity areas, spatial and temporal mitigation measures, including cessation of activities, may be instituted more frequently during the 5-year period of the rule.

Climate change over time continues to be a major concern to the Service, and we are currently involved in the collection of baseline data to help us understand how the effects of climate change will be manifested in the SBS polar bear population. As we gain a better understanding of climate change effects on the SBS population, we will incorporate the information in future actions. Ongoing studies include those led by the Service and the USGS Alaska Science Center to examine polar bear habitat use, reproduction, and survival relative to a changing sea ice environment.

Specific objectives of the project include: an enhanced understanding of polar bear habitat availability and quality influenced by ongoing climate changes and the response by polar bears; the effects of polar bear responses to climate-induced changes to the sea ice environment on body condition of adults, numbers and sizes of offspring, and survival of offspring to weaning (recruitment); and population age structure.

Although Pacific walruses are relatively rare in the Beaufort Sea, the Service and USGS are conducting multiyear studies on the population to investigate movements and habitat use patterns. It is possible that as sea ice diminishes in the Chukchi Sea beyond the 5-year period of this rule, more walruses will migrate east into the Beaufort Sea.

Impact on Subsistence Take

Based on community consultations, locations of hunting areas, the potential overlap of hunting areas and Industry projects, the best scientific information available, and the results of monitoring data, we find that take caused by oil and gas exploration, development, and production activities in the Beaufort Sea and adjacent northern coast of Alaska will not have an unmitigable adverse impact on the availability of polar bears and Pacific walruses for taking for subsistence uses during the period of the rule. In making this finding, we considered the following: (1) Records on subsistence harvest from the Service's Marking, Tagging and Reporting Program; (2) community consultations; (3) effectiveness of the POC process between Industry and affected Native communities; and (4) anticipated 5-year effects of Industry activities on subsistence hunting. In addition, our findings also incorporated the results of coastal aerial surveys conducted within the area during the past 7 years, direct observations of polar bears occurring near bowhead whale carcasses on Barter Island and on Cross Island during annual fall bowhead whaling efforts conducted by the villages of Kaktovik and Nuiqsut, respectively, and anecdotal reports of North Slope residents.

Polar bears and Pacific walruses represent a small portion, in terms of the number of animals, of the total subsistence harvest for the villages of Barrow, Nuiqsut, and Kaktovik. However, the low numbers do not mean that the harvest of these species is not

important to Alaska Natives. Prior to receipt of an LOA, Industry must provide evidence to us that community consultations have occurred or that an adequate POC has been presented to the subsistence communities. Industry will be required to contact subsistence communities that may be affected by its activities to discuss potential conflicts caused by the location, timing, and methods of proposed operations. Industry must make reasonable efforts to ensure that activities do not interfere with subsistence hunting and that adverse effects on the availability of polar bear or Pacific walruses are minimized. Although multiple meetings for multiple projects from numerous operators have already taken place, no official concerns have been voiced by the Native communities with regard to Industry activities limiting the availability of polar bears or walruses for subsistence uses. However, should such a concern be voiced as Industry continues to reach out to the Native communities, development of Plans of Cooperation, which must identify measures to minimize any adverse effects, will be required. The POC will ensure that oil and gas activities will continue not to have an unmitigable adverse impact on the availability of the species or stock for subsistence uses. This POC must provide the procedures addressing how Industry will work with the affected Native communities and what actions will be taken to avoid interference with subsistence hunting of polar bear and walruses, as warranted.

The Service has not received any reports and is aware of no information that indicates that polar bears or walruses are being or will be deflected from hunting areas or impacted in any way that diminishes their availability for subsistence use by the expected level of oil and gas activity. If there is evidence during the 5-year period of the regulations that oil and gas activities are affecting the availability of polar bears or walruses for take for subsistence uses, we will reevaluate our findings regarding permissible limits of take and the measures required to ensure continued subsistence hunting opportunities.

Monitoring and Reporting

The purpose of monitoring requirements is to assess the effects of industrial activities on polar bears and walruses to ensure that take is consistent with that anticipated in the negligible impact and subsistence use analyses, and to detect any unanticipated effects on the species. Monitoring plans document when and how bears and walruses are encountered, the number of bears and walruses, and their behavior during the encounter. This information allows the Service to measure encounter rates and trends of bear and walrus activity in the industrial areas (such as numbers and gender, activity, and seasonal use) and to estimate numbers of animals potentially affected by Industry. Monitoring plans are site-specific, dependent on the proximity of the activity to important habitat areas, such as den sites, travel corridors, and food sources; however, all activities are required to report all sightings of polar bears and walruses. To the extent possible, monitors will record group size, age, sex, reaction, duration of interaction, and closest approach to Industry. Activities within the coast of the geographic region may incorporate daily watch logs as well, which record 24-hour animal observations throughout the duration of the project. Polar bear monitors will be incorporated into the monitoring plan if bears are known to frequent the area or known polar bear dens are present in the area. At offshore Industry sites, systematic monitoring protocols will be implemented to statistically monitor observation trends of walruses or polar bears in the nearshore areas where they usually occur.

Monitoring activities are summarized and reported in a formal report each year. The applicant must submit an annual monitoring and reporting plan at least 90 days prior to the initiation of a proposed activity, and the applicant must submit a final monitoring report to us no later than 90 days after the completion of the activity. We base each year's monitoring objective on the previous year's monitoring results.

We require an approved plan for monitoring and reporting the effects of oil and gas Industry exploration, development, and production activities on polar bear and walruses prior to issuance of an LOA. Since production activities are continuous and long-term, upon approval, LOAs and their required monitoring and reporting plans will be issued for the life of the activity or until the expiration of the regulations, whichever occurs first. Each year, prior to January 15, we require that the operator submit development and production activity monitoring results of the previous year's activity. We require approval of the monitoring results for continued operation under the LOA.

Treaty Obligations

The ITRs are consistent with the Bilateral Agreement for the Conservation and Management of the Polar Bear between the United States and Russia. Article II of the Polar Bear Agreement lists three obligations of the Parties in protecting polar bear habitat:

(1) ''Take appropriate action to protect the ecosystem of which polar bears are a part;''

(2) ''Give special attention to habitat components such as denning and feeding sites and migration patterns;'' and

(3) ''Manage polar bear populations in accordance with sound conservation practices based on the best available scientific data.''

This rule is also consistent with the Service's treaty obligations because it incorporates mitigation measures that ensure the protection of polar bear habitat. LOAs for industrial activities are conditioned to include area or seasonal timing limitations or prohibitions, such as placing 1-km (1-mi) avoidance buffers around known or observed dens (which halts or limits activity until the bear naturally leaves the den), building roads perpendicular to the coast to allow for polar bear movements along the coast, and monitoring the effects of the activities on polar bears. Available denning habitat maps are provided by the USGS.

Discussion of Comments on the Proposed Rule

The proposed rule, which was published in the **Federal Register** (76 FR 13454) on March 11, 2011, included a request for public comments. The closing date for the comment period was April 11, 2011. The Service received 7,523 comments. Two commenters indicated support for issuing this rule. The majority of comments (the result of an e-mail campaign) received indicated opposition. The following issues were raised by commenters:

Comment 1: Advise the applicant of the desirability of initiating a conference for the Pacific walrus to help fulfill the applicant's obligations under the Endangered Species Act for the 5-year period of the final rule.

Response: The Service agrees with this comment. Since the status review of Pacific walrus was published, we have advised the applicant and the action agencies for Industry projects that, when applicable and appropriate, they have the option to initiate a conference with the Service regarding Pacific walrus.

Comment 2: Prior to issuing the final rule, the Service should describe all updated information for the four offshore oil and gas industry sites (Northstar, Liberty, Oooguruk and Nikaitchuq), assess the risk of an oil spill to polar bears at Oooguruk and Nikaitchuq, and reassess the risk of an

oil spill to polar bears for the Northstar and Liberty sites, where updated information is available.

Response: The Service analysis of Industry activities for this rulemaking used the best available information and encapsulates all of the known Industry activities that will occur in the geographic region during the 5-year regulation period. If additional activities are proposed that were not included in the Industry petition or otherwise known at this time, the Service will evaluate the potential impacts associated with those projects to determine whether a given project lies within the scope of the analysis for these regulations. It should be noted that the Service considers spill probabilities alone insufficient to assess the risk to polar bears. Therefore, our risk assessment incorporates the likelihood that a spill would occur as well as the potential impacts of such a spill. We understand that variables for risk assessment from various offshore sites will be different; however, our analysis was not intended to assess risk of an oil spill from each individual site, and the Service believes that the analysis of the Northstar and Liberty sites led to a valid representation and analysis of the types of risks polar bears would encounter if a large spill occurred in the nearshore areas of the Beaufort Sea. The rule contains a discussion of these quantified impacts as well as qualitative analysis of other potential sources and sizes of oil spills. Although spill probabilities for other offshore facilities, and those in development, would provide the Service better insights into the impacts of oil spills on polar bears and walrus, oil spill trajectories were unavailable for these other sites, and the analysis presented represents the best data and science available. The Service will continue to evaluate the potential risk of these activities as new information becomes available.

Comment 3: The Service should require applicants for letters of authorization under the final rule to incorporate those updated oil spill projections in their applications, when available.

Response: The Service agrees with this comment, and for those projects where updated oil spill projections are available and appropriate to the type of project, the Service will seek this information to inform our review of requests for letters of authorization.

Comment 4: One commenter noted that one of the seismic survey mitigation measures requires powering or shutting down airguns if an aggregation of 12 or more walruses is detected within the 160-dB re 1 μPa isopleth. At the same time, the Service only proposes to authorize the taking of 10 walruses by Level B harassment. These numbers are inconsistent and could result in the taking of a larger number of walruses than authorized without the implementation of mitigation effects. The commenter suggested the Service correct this inconsistency.

Response: Although individuals or groups of a few walruses are occasionally observed in some areas of the southern Beaufort Sea, Pacific walruses are extralimital in the area covered by these regulations (as discussed in the body of the rule). The reference to an aggregation of 12 or more walruses detected within the 160-dB re 1 μPa isopleth is a stipulation originally developed for the Chukchi Sea to ensure that Industry seismic operations not disturb aggregations of feeding walruses, potentially displacing animals from preferred foraging areas. It is not intended to address a few animals encountered transiting through an area. For this rule the Service estimates that the projected number of takes of Pacific walruses by Industry will be no more than 10 takes by harassment per year. This take estimate is based on historic Industry monitoring observations. In addition, based on the projected level of exploration activity, it is unlikely that the number of takes will increase significantly in the next 5 years. However, we have retained the mitigation measure to ensure the protection of walruses on the extremely remote chance that an aggregation of 12 or more walruses would be encountered.

Comment 5: The language regarding consultation with potentially affected subsistence communities and subsistence user groups where a POC [Plan of Cooperation] is relevant is unclear and should be clarified.

Response: The Service considers consultation with potentially affected communities to be a critical activity to ensure the concerns of the community are included in the planning process as well as to ensure the availability of polar bears and Pacific walruses for subsistence hunting. The Service will continue to work with communities and industry on a case-by-case basis to provide clarification regarding when and where a Plan of Cooperation is needed.

Comment 6: The spill risk assessment significantly overstates quantified risks from spills by use of extremely conservative modeling assumptions.

Response: The Service disagrees with this comment. Because we consider the probability of a spill alone to be insufficient to assess the risk to polar bears, our risk assessment incorporates the likelihood that a spill would occur as well as the potential impacts of such a spill. We understand that variables and modeling assumptions for risk assessment from various offshore sites will be different; however, our analysis was not intended to assess risk of an oil spill from each individual site, and the Service believes that it led to a valid representation of the types of risks polar bears would encounter if a large spill occurred in the nearshore areas of the Beaufort Sea. The rule contains a discussion of these quantified impacts, as well as qualitative analysis of other potential sources and sizes of oil spills. The Service will continue to evaluate the potential risk and potential impacts of these activities as new information becomes available.

Comment 7: The incidental take regulations underestimate impacts to polar bears and Pacific walruses and fail to support the Service's conclusion that oil and gas activities will have no more than a negligible impact on small numbers of polar bears and Pacific walruses in the Beaufort Sea.

Response: The Service disagrees. The Service analysis of oil and gas activities for this rulemaking encapsulates all of the known oil and gas industry activities that will occur in the geographic region during the 5-year regulation period. If additional activities are proposed that were not included in the Industry petition or otherwise known at this time, the Service will evaluate the potential impacts associated with those projects to determine whether a given project lies within the scope of the analysis for these regulations. The Service has analyzed oil and gas operations taking into account risk factors to polar bears and walruses, such as potential habitat loss due to climate change, hunting, disease, oil spills, contaminants, and effects on prey species within the geographic region.

The Service's analysis for this rulemaking also considers cumulative effects of all oil and gas activities in the area over time. Cumulative impacts of oil and gas activities are assessed, in part, through the information we gain in monitoring reports, which are required for each operator under the authorizations. Incidental take regulations have been in place in the Arctic oil and gas fields for the past 13 years. Information from these reports provides a history of past effects on walruses and polar bears from interactions with oil and gas activities. Information on previous levels of impact is used to evaluate future

impacts from existing and proposed industry activities and facilities. In addition, information used in our cumulative effects assessment includes research publications and data, traditional knowledge of polar bear habitat use, anecdotal observations, and professional judgment.

Monitoring results indicate little to no short-term impact on polar bears or Pacific walruses from oil and gas activities. We evaluated the sum total of both subtle and acute impacts likely to occur from industrial activity and, using this information, we determined that all direct and indirect effects, including cumulative effects, of industrial activities would not adversely affect the species through effects on rates of recruitment or survival. Based on past monitoring reports, the level of interaction between Industry and polar bears and Pacific walrus has been minimal. Additional information, such as subsistence harvest levels and incidental observations of polar bears near shore, provides evidence that these populations have not been adversely affected. For the next 5 years, we anticipate the level of oil and gas industry interactions with polar bears and Pacific walruses will be similar to interactions of the past years.

Comment 8: The Service conflates ''small numbers'' and ''negligible impact'' by treating ''small numbers'' as being relative to population size. The Service defines ''small numbers'' in such a way that conflates it with the ''negligible impact'' determination and impermissibly renders it meaningless. The number of polar bears that may be taken pursuant to the rule is not small, either in an absolute sense or a relative sense. By relying on this unlawful standard in the proposed authorizations, the Service is committing prejudicial error rendering invalid any final regulations or LOAs issued.

Response: The Service disagrees. The Service has determined that the anticipated number of polar bears and walruses that are likely to modify their behavior as a result of oil and gas industry activity is small (150 takes per year for polar bears and 10 takes per year for Pacific walruses). In most cases, takes are behavioral changes that consist of temporary, minor behavioral modifications, which will have no effect on rates of recruitment or survival. Other takes will be associated with deterrence or hazing events. The Service's analysis of ''small numbers'' complies with the agency's regulatory definition and is an appropriate reflection of Congress' intent. As we noted during our development of this definition (48 FR 31220, July 7, 1983), Congress itself recognized the ''imprecision of the term 'small numbers,' but was unable to offer a more precise formulation because the concept is not capable of being expressed in absolute numerical limits.'' See H.R. Report No. 97–228 at 19. Thus, Congress itself focused on the anticipated effects of the activity on the species and stated that authorization should be available to persons ''whose taking of marine mammals is infrequent, unavoidable, or accidental.'' *Id.*

Comment 9: The Service underestimates the impacts to polar bears from industry activities because it does not adequately account for their weakened condition as a result of climate change.

Response: In making this determination, the Service considered the best available information regarding potential impacts of climate change on polar bears and Pacific walruses and their habitats. The Service agrees that climate change will likely serve as an increasing stressor to polar bears; however, we conclude that over the 5-year regulatory period, it would not change the amount or nature of incidental take caused by Industry described and evaluated here. The Service will continue to monitor and evaluate Industry activity impacts to polar bears as information becomes available.

Comment 10: The Service's oil spill analysis drastically underestimates the amount of oil that could be spilled as a result of the authorized activities.

Response: The Service disagrees. The oil spill estimate used in the regulations is the best available information for the Beaufort Sea (the estimate used by the commenter is for the Chukchi Sea). The Service evaluated the probability of an oil spill in relation to the dynamics of bear presence (geographically and temporally), and in relation to bear behavior, physiology, and habitat use and requirements.

Comment 11: The Service should model the impacts of a very large oil spill during exploration drilling. The estimated spill size used in these regulations is not appropriate.

Response: No estimate currently exists for a ''very large oil spill'' in the Beaufort Sea. The Service's analysis was conducted using the most current oil spill estimate available. As new information relevant to these regulations becomes available, the Service will use it to analyze impacts of potential spills to polar bears and walruses.

Comment 12: Due to the Service's interpretation of ''small numbers'' and ''negligible impact'' in its findings, as well as the possibility of a very large oil spill, the Service's conclusions that incidental take ''will not have an unmitigatable adverse impact on the availability of such species or stock for taking for subsistence uses'' by Alaska Natives are arbitrary and capricious.

Response: The Service disagrees. For the same reasons outlined in the responses above and elsewhere in this rule, the Service's finding is fully supported and meets all statutory standards. The Service's finding is based on the best available information, such as the polar bear and walrus harvest data provided by the three affected communities (Barrow, Kaktovik, and Nuiqsut) through the Service's Marking, Tagging and Reporting Program. That information indicates that activities will not have an unmitigable, adverse impact on the availability of these species for subsistence take. We also based our finding on (1) The results of coastal aerial surveys conducted within the area during the past 7 years; (2) direct observations of polar bears occurring near bowhead whale carcasses on Barter Island and on Cross Island during the annual fall bowhead whaling efforts of the villages of Kaktovik and Nuiqsut; (3) community consultations; (4) locations of hunting areas; (5) the potential overlap of hunting areas and Industry projects; (6) results of monitoring data; and (7) anecdotal reports of North Slope residents. The Service has not received any reports and is unaware of any information that indicates that polar bears or walruses are being or will be deflected or impacted by the expected level of oil and gas activity in a way that diminishes their availability for subsistence use. Furthermore, the regulatory process will allow the opportunity for communities to review operational plans and to make recommendations for additional mitigation measures, if necessary.

Comment 13: The proposed rule states that ''no official concerns have been voiced by the Native communities with regard to Industry activities limiting availability of polar bears or walruses for subsistence use.'' However, groups representing Native people have repeatedly expressed concern about the impacts of oil and gas development on subsistence resources.

Response: Although the Service agrees that Native communities have expressed concerns regarding impacts of oil and gas activities on marine mammal subsistence resources, in general, the issue addressed here is whether these regulations might impact the availability of polar bears and walruses for taking for subsistence uses by Alaska Natives in the Beaufort Sea area. We are not

aware of any official concerns voiced by Native communities that industry activities would do so. Information received by the Service and received by Industry during community consultations as part of their POC process does not indicate that oil and gas activities limit the availability of polar bears and Pacific walruses for subsistence use in the Beaufort Sea region.

In addition, the LOA process identified in the regulations requires Industry to work with the Native communities most likely to be affected to address any impacts to resource availability. Coordination with the affected subsistence communities and development of the POC is the responsibility of Industry, not the Service; however, the Service offers guidance during the process, if necessary. The requirements and process for the POC, including the Services' right to review and reject the POC if it does not provide adequate safeguards to ensure that marine mammals will remain available for subsistence use, are described in the preamble of the rule and reiterated in the regulations.

Also, as stated in the regulations, the Service has ongoing cooperative relationships with the North Slope Borough and the Inupiat-Inuvialuit Game Commission, where we work cooperatively to ensure that data collected from harvest and research are used to ensure that polar bears are available for harvest in the future; provide information to co-management partners that allows them to evaluate harvest relative to their management agreements and objectives; and provide information that allows evaluation of the status, trends, and health of polar bear populations. This cooperation includes discussing our Incidental Take Program with representatives from these organizations and answering any concerns they have about Industry impacts on subsistence uses of polar bears and walruses.

Comment 14. The Service must prepare a full environmental impact statement (EIS) to meet the requirements of the National Environmental Policy Act (NEPA).

Response: The Service disagrees. Section 1501.4(b) of the regulations for NEPA, found at 40 CFR Chapter V, indicates that, in determining whether to prepare an EIS, a Federal agency may prepare an EA and, based on the EA, make a determination whether to prepare an EIS. The Department of the Interior's policy and procedures for compliance with NEPA (69 FR 10866; March 8, 2004) further affirms that the purpose of an EA is to allow the responsible official to determine whether to prepare an EIS or a ''Finding of No Significant Impact'' (FONSI). The Service analyzed the proposed activity, *i.e.,* issuance of implementing regulations, in accordance with the criteria of NEPA and determined that it does not constitute a major Federal action significantly affecting the quality of the human environment. Potential impacts of these regulations on the species and the environment, rather than potential impacts of the oil and gas activities, were analyzed in the EA because the Service does not authorize the actual Industry activities. Those activities are authorized by other State and Federal agencies, and would likely occur even without incidental take authority. Incidental take regulations provide the Service with a means of interacting with Industry to ensure that the impacts to polar bears and Pacific walruses are minimal. The analysis in the EA found that the proposed activity would have a negligible impact on Pacific walruses and polar bears and would not have an unmitigable adverse impact on subsistence users. Therefore, in accordance with NEPA, the Service has issued a FONSI, and an EIS is not required.

Comment 15: The Service must consider other reasonable alternatives, including the exclusion of certain parts of polar bear critical habitat from the authorizations and the requirement of additional mitigation measures, such as shutdown of offshore exploration operations in low-visibility conditions.

Response: The Service recognizes these concerns and has addressed them in the body of the regulations as regulatory stipulations rather than including them as alternatives in the EA. For example, while we do not exclude large portions of critical habitat designated under the ESA, we currently exclude maternal denning habitat from industry activity under LOA stipulations using the 1.6-km (1-mi) buffer around known dens to limit disturbance to the maternal den. LOA stipulations also take into account low-visibility conditions. Ramp-up procedures for marine seismic activities incorporate measures that limit activity in low-visibility conditions. In addition, we are working with companies that will be operating in the marine environment to test and implement, and possibly apply, technology such as FLIR imagery to minimize potential impacts to Service trust species in low-visibility conditions in the marine environment.

Comment 16: The Service must describe a true ''no action'' alternative that represents the absence of industry activities without MMPA authorization.

Response: The Service disagrees. The action being considered is the issuance of incidental take regulations. Therefore, the ''no action'' alternative would be not to issue incidental take regulations. However, Section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1371(a)(5)(A)) states that the Secretary of the Interior (Secretary), through the Director of the Service, shall allow the incidental, but not intentional, taking of small numbers of marine mammals in response to requests by U.S. citizens engaged in a specified activity (other than commercial fishing) in a specified geographic region if the Secretary finds that the total of such taking will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses. Therefore, if a citizen petitions the Service to promulgate regulations, we are required to initiate the process and to make the appropriate findings. If there is an absence of industry activities, as stated by this commenter, there would be no request for incidental take regulations and, consequently, there would be no need for any analysis or alternatives.

Comment 17: The Service must analyze the cumulative effects of all the past, present, and likely future activities and events affecting the polar bear and walrus in its NEPA analysis.

Response: The Service disagrees. Consistent with NEPA requirements, the Service has analyzed all relevant direct, indirect, and cumulative effects to polar bears and walruses potentially caused by known oil and gas activities in the Beaufort Sea area during the 5-year regulation period. Examples of these effects include potential habitat loss, harassment, lethal take, oil spills, contaminants, and effects on prey species. If additional activities are proposed that were not included in the Industry petition or otherwise known at this time, the Service will evaluate the potential impacts associated with those projects to determine whether a given project lies within the scope of the analysis for these regulations.

Cumulative effects, including climate change, were analyzed in the context of making a negligible effect finding for the final regulations. From the Service perspective, impacts to polar bears and walruses will be minimized with regulations in place because the Service will have increased ability to work directly with the Industry operators to implement mitigation measures.

Cumulative impacts of oil and gas activities have been assessed, in part, through the information we have gained in prior Industry monitoring reports for the Beaufort Sea, which are required for each operator under the authorizations. Information from these reports provides a history of past Industry effects on walruses and polar bears from interactions with oil and gas activities. In addition, information used in our cumulative effects assessment includes research publications and data, traditional knowledge of polar bear and walrus habitat use in the area, anecdotal observations, and professional judgment. Monitoring results indicate little short-term impact on polar bears or Pacific walruses, given these types of activities. We evaluated the sum total of both subtle and acute impacts likely to occur from industrial activity and, using this information, we determined that all direct and indirect effects, including cumulative effects, of industrial activities during the 5-year regulatory period would not adversely affect the species through effects on rates of recruitment or survival. Past information indicates that the level of interaction between Industry and polar bears and Pacific walruses has been minimal. Additional information, such as subsistence harvest levels and incidental observations of polar bears near shore, provides evidence that these populations have not been adversely affected by oil and gas activities.

The Service is continually involved in the collection of data to help us understand how the changing Arctic environment will affect polar bear and walrus stocks in Alaska. As we gain a better understanding of climate change and other effects on these resources, we will incorporate the information in future actions. Ongoing studies are examining polar bear habitat use, reproduction, and survival relative to a changing sea-ice environment. Specific objectives of the project include: Determining polar bear habitat availability and quality, influenced by ongoing climate change and the response by polar bears to such change; the effects of polar bear responses to climate-induced changes to the sea-ice environment on body condition of adults, numbers and sizes of offspring, and survival of offspring to weaning (recruitment); and population age structure. The Service and the USGS are also conducting multiyear studies of the walrus population to estimate population size and investigate habitat use patterns. Our goal is to continue to collect or improve on the collection of the types of information that have been useful in assessing cumulative effects in the past. We anticipate that additional analysis and the collection of additional data will be necessary to improve upon future longer-range impact assessments.

Comment 18: An EIS for the regulations should also analyze the impacts of a very large oil spill on polar bears and pacific walrus in the Beaufort Sea.

Response: The Service analysis was conducted using the most current oil spill estimate available; no estimate currently exists for a ''very large oil spill'' in the Beaufort Sea. As new information relevant to these regulations becomes available, the Service will use it to analyze impacts of potential spills to polar bears and walruses.

Comment 19: The Service's intra-agency consultation should result in a jeopardy finding unless the Service can guarantee that the authorized activities do not violate the ESA.

Response: Consistent with Section 7 of the ESA and Service policy, the Service has completed Intra-agency consultation on these regulations and issued a Biological Opinion (BO) on July 13, 2011. The BO concluded that promulgation of these ITRs is not likely to jeopardize the continued existence of any listed or candidate species or adversely modify their designated critical habitat.

Comment 20: The proposed regulations do not meet the Marine Mammal Protection Act's requirements that the permitted activities harm only small numbers of marine mammals and have only a negligible impact on the species.

Response: We disagree. As explained in the final rule, we anticipate that no more than 150 nonlethal takes of polar bears and no more than 10 nonlethal takes of Pacific walruses will occur per year as a result of oil and gas activities associated with these regulations. We believe these numbers constitute a ''small number,'' and thus that these activities will have a negligible impact on the polar bear and Pacific walrus populations. Furthermore, the Service believes that potential impacts to walruses, polar bears, and the subsistence use of these resources can be greatly reduced through the operating restrictions, monitoring programs, and adaptive management responses set forth in this rule.

Comment 21: Polar bears and Pacific walruses will be heavily impacted by oil and gas activities.

Response: All anticipated takes will be nonlethal Level B harassment, involving only temporary changes in behavior. The required mitigation and monitoring measures described in the regulations are expected to prevent injurious Level A takes, and thus the number of lethal takes is projected to be zero. We do not expect the total of the disturbances to adversely affect rates of recruitment or survival in the Southern Beaufort Sea polar bear or the Pacific walrus stocks.

By creating a framework that provides mitigation and monitoring measures intended to minimize the effects of Industry activities on polar bears and walruses, the regulations prevent major impacts to polar bears and walruses. The goal of the regulations is to minimize any potential disturbances and impacts to polar bears and walruses that could otherwise result due to Industry activities by limiting animal—human interactions and by monitoring and mitigating any take that may occur. These requirements also create a feedback loop to analyze and assess trends associated with potential effects on polar bears and walruses that can be addressed through the LOA process.

Comment 22: Oil drilling safety technology, such as blow-out preventers, are flawed and may not function properly under Arctic conditions.

Response: The Service appreciates information that may aid our determinations for issuing regulations. These comments, however, are beyond the scope of this rule and beyond the petitioner's request. The Service's analysis of Industry activities for this rulemaking used the best available information and encapsulates all of the known Industry activities that will occur in the geographic region during the 5-year regulation period. In considering the risk to polar bears from potential oil spills, we relied on the best available information to evaluate the likelihood a spill might occur and then reach polar bear habitat when bears were present. Furthermore, the Service considers spill probabilities alone insufficient to assess the risk to polar bears. Our risk assessment incorporates the likelihood that a spill may occur as well as the potential impacts of such a spill. The Service analyzed oil and gas operations, taking into account risk factors to polar bears and walrus, such as potential habitat loss, harassment, lethal take, oil spills, contaminants, and effects on prey species that are directly related to Industry within the geographic region.

Comment 23: One commenter stated that the toxicity and mutagenicity of volatile hydrocarbons and hydrocarbons released into the water and soil from the petroleum and gas industries, when added to nutritional stress due to global warming and the long-distance

deposition of pollutants into the Arctic, would be a highly damaging burden on polar bears and marine mammal populations in the Arctic.

Response: The Service agrees that the release of toxic substances into the habitat of polar bears and Pacific walruses may have detrimental effects upon those animals exposed. The Service's analysis acknowledges the potential for oil spills to occur. The accidental release of toxic substances, such as in the case of an oil spill, is an illegal act. No part of this rule authorizes the release of toxic substances into the environment nor the exposure of wildlife to such toxins. In these regulations, we evaluated the probability of an oil spill, the dynamics of how polar bears or walruses would interact with a potential spill, both behaviorally and physiologically, and the effect of an oil spill on polar bear and walrus habitat use and requirements. We determined that any take of polar bears or walruses would be negligible. Using this analysis, the Service has developed mitigation measures and response plans to minimize impacts on our trust species in the event of a spill. The Service believes that the occurrence of such an event is minimized by adherence to the regulatory standards that are in place. This belief is supported by historical evidence, which shows that adherence to oil spill plans and management practices has resulted in no major spills in the nearshore area where production facilities are located and where exploration activities will occur in the Beaufort Sea. In the event of a large spill, we would reassess the impacts to the polar bear and walrus populations and reconsider the appropriateness of authorizations for taking through Section 101(a)(5)(A) of the MMPA.

Required Determinations

National Environmental Policy Act (NEPA) Considerations

We have prepared an EA in conjunction with this rulemaking and have determined that this rulemaking is not a major Federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C) of the NEPA of 1969. For a copy of the EA, contact the individual identified above in the section **FOR FURTHER INFORMATION CONTACT** or go to *http://www.regulations.gov.*

Endangered Species Act

On May 15, 2008, the Service listed the polar bear as a threatened species under the ESA (73 FR 28212), and on December 7, 2010 (75 FR 76086), we designated critical habitat for polar bear populations in the United States, effective January 6, 2011. On February 10, 2011, we found that listing the Pacific walrus as endangered or threatened was warranted but precluded by higher priority actions and added Pacific walrus to our candidate species list (76 FR 7634). Section 7(a)(1) and (2) of the ESA (16 U.S.C. 1536(a)(1) and (2)) direct the Service to review its programs and to utilize such programs in the furtherance of the purposes of the ESA and to ensure that a proposed action is not likely to jeopardize the continued existence of an ESA-listed species or result in the destruction or adverse modification of critical habitat. Service policy requires that candidate species also be considered when making natural resource decisions. Candidate species are treated as if they are proposed for listing for internal Section 7 compliance. For actions that may result in adverse effects to candidate species, the program within the Service proposing the action would confer with the appropriate Ecological Services field office for any actions they would authorize, fund, or carry out. Consistent with these statutory requirements, the Service's Fairbanks Fish and Wildlife Field Office has completed Intra-Service section 7 consultation on these regulations and has concluded in a BO issued on July 13, 2011, that the action is not likely to jeopardize the continued existence of any listed or candidate species or adversely modify their designated critical habitat.

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule 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.

Small Business Regulatory Enforcement Fairness Act

We have determined that this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule is not likely to result in a major increase in costs or prices for consumers, individual industries, or government agencies or have significant adverse effects on competition, employment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

We have also determined that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Oil companies and their contractors conducting exploration, development, and production activities in Alaska have been identified as the only likely applicants under the regulations. Therefore, a Regulatory Flexibility Analysis is not required. In addition, these potential applicants have not been identified as small businesses and, therefore, a Small Entity Compliance Guide is not required. The analysis for this rule is available from the individual identified above in **FOR FURTHER INFORMATION CONTACT**.

Takings Implications

This rule does not have takings implications under Executive Order 12630 because it authorizes the nonlethal, incidental, but not intentional, take of walruses and polar bears by oil and gas Industry companies and thereby exempts these companies from civil and criminal liability as long as they operate in compliance with the terms of their LOAs. Therefore, a takings implications assessment is not required.

Federalism Effects

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132. The MMPA gives the Service the authority and responsibility to protect walruses and polar bears.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*), this rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. The Service has determined and certifies pursuant to the Unfunded Mandates Reform Act that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities. This rule will not produce a Federal mandate of $100 million or greater in any year, *i.e.,* it is not a

''significant regulatory action'' under the Unfunded Mandates Reform Act.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, Secretarial Order 3225, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a Government-to-Government basis. We have evaluated possible effects on federally recognized Alaska Native tribes. Through the LOA process identified in the regulations, Industry initiates a communication process, culminating in a POC, if warranted, with the Native communities most likely to be affected and engages these communities in numerous informational meetings.

To facilitate co-management activities, cooperative agreements have been completed by the Service, the ANC, and the EWC. The cooperative agreements fund a wide variety of management issues, including: Commission co-management operations; biological sampling programs; harvest monitoring; collection of Native knowledge in management; international coordination on management issues; cooperative enforcement of the MMPA; and development of local conservation plans. To help realize mutual management goals, the Service, ANC, and EWC regularly hold meetings to discuss future expectations and to outline a shared vision of co-management.

The Service also has ongoing cooperative relationships with the North Slope Borough and the Inupiat-Inuvialuit Game Commission, where we work cooperatively to ensure that data collected from harvest and research are used to ensure that polar bears are available for harvest in the future; provide information to co-management partners that allows them to evaluate harvest relative to their management agreements and objectives; and provide information that allows evaluation of the status, trends, and health of polar bear populations.

Civil Justice Reform

The Departmental Solicitor's Office has determined that these regulations do not unduly burden the judicial system and meet the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

This rule contains information collection requirements. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The information collection requirements included in this rule are approved by the OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The OMB control number assigned to these information collection requirements is 1018–0070, which expires on January 31, 2014. This control number covers the information collection, recordkeeping, and reporting requirements in 50 CFR 18, subpart J, which are associated with the development and issuance of specific regulations and LOAs.

Energy Effects

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule provides exceptions from the taking prohibitions of the MMPA for entities engaged in the exploration of oil and gas in the Beaufort Sea and adjacent coast of Alaska. By providing certainty regarding compliance with the MMPA, this rule will have a positive effect on Industry and its activities. Although the rule requires Industry to take a number of actions, these actions have been undertaken by Industry for many years as part of similar past regulations. Therefore, this rule is not expected to significantly affect energy supplies, distribution, or use and does not constitute a significant energy action. No Statement of Energy Effects is required.

References

For a list of the references cited in this rule, see Docket No. FWS–R7–FHC–2010–0098, available at *http://www.regulations.gov.*

List of Subjects in 50 CFR Part 18

Administrative practice and procedure, Alaska, Imports, Indians, Marine mammals, Oil and gas exploration, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

For the reasons set forth in the preamble, the Service amends part 18, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below.

PART 18—MARINE MAMMALS

■ 1. The authority citation of 50 CFR part 18 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Add a new subpart J to part 18 to read as follows:

Subpart J—Nonlethal Taking of Marine Mammals Incidental to Oil and Gas Exploration, Development, and Production Activities in the Beaufort Sea and Adjacent Northern Coast of Alaska

Sec.
18.121 What specified activities does this subpart cover?
18.122 In what specified geographic region does this subpart apply?
18.123 When is this subpart effective?
18.124 How do I obtain a Letter of Authorization?
18.125 What criteria does the Service use to evaluate Letter of Authorization requests?
18.126 What does a Letter of Authorization allow?
18.127 What activities are prohibited?
18.128 What are the mitigation, monitoring, and reporting requirements?
18.129 What are the information collection requirements?

Subpart J—Nonlethal Taking of Marine Mammals Incidental to Oil and Gas Exploration, Development, and Production Activities in the Beaufort Sea and Adjacent Northern Coast of Alaska

§ 18.121 What specified activities does this subpart cover?

Regulations in this subpart apply to the nonlethal incidental, but not intentional, take of small numbers of polar bears and Pacific walruses by you (U.S. citizens as defined in § 18.27(c)) while engaged in oil and gas exploration, development, and production activities in the Beaufort Sea and adjacent northern coast of Alaska.

§ 18.122 In what specified geographic region does this subpart apply?

This subpart applies to the specified geographic region defined by all Beaufort Sea waters east of a north-south line through Point Barrow (71°23′29″ N, −156 °28″30 W, BGN 1944), and up to 200 miles north of Point Barrow, including all Alaska coastal areas, State waters, and Outer Continental Shelf waters east of that line to the Canadian border. The onshore region is the same north/south line at Barrow, 25 miles inland and east to the Canning River. The Arctic National Wildlife Refuge is not included in the area covered by this subpart. Figure 1 shows the area where this subpart applies.

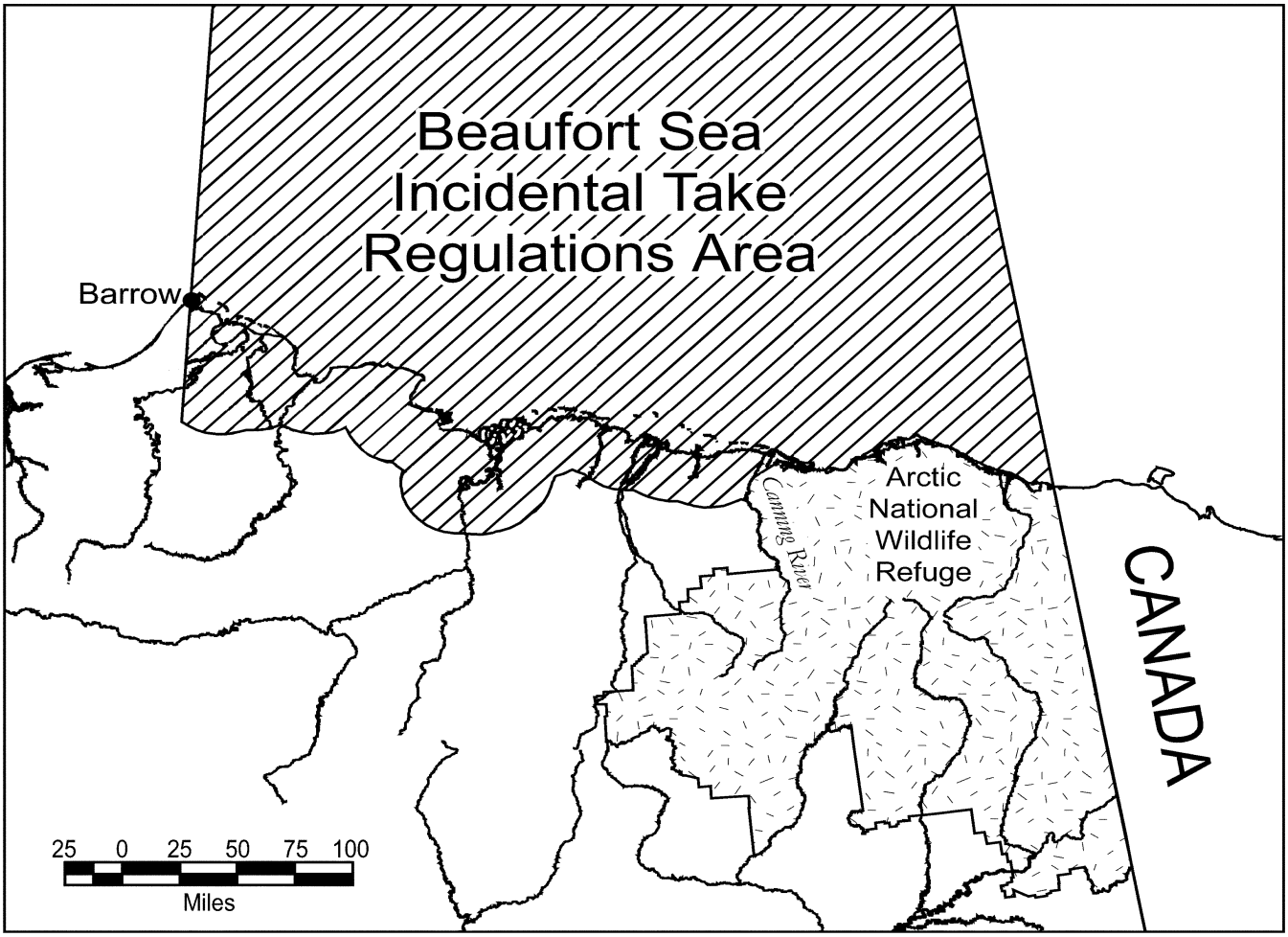

Figure 1. Specific geographic area covered by the Beaufort Sea incidental take regulations.

§ 18.123 When is this subpart effective?

Regulations in this subpart are effective from August 3, 2011, through August 3, 2016, for year-round oil and gas exploration, development, and production activities.

§ 18.124 How do I obtain a Letter of Authorization?

(a) You must be a U.S. citizen as defined in § 18.27(c).

(b) If you are conducting an oil and gas exploration, development, or production activity in the specified geographic region described in § 18.122 that may cause the taking of polar bears or Pacific walruses in execution of those activities and you want nonlethal incidental take authorization under this rule, you must apply for a Letter of Authorization for each exploration activity or a Letter of Authorization for activities in each development or production area. You must submit the application for authorization to our Alaska Regional Director (see 50 CFR 2.2 for address) at least 90 days prior to the start of the proposed activity.

(c) Your application for a Letter of Authorization must include the following information:

(1) A description of the activity, the dates and duration of the activity, the specific location, and the estimated area affected by that activity, *i.e.,* a plan of operation.

(2) A site-specific plan to monitor the effects of the activity on the behavior of polar bears and Pacific walruses that may be present during the ongoing activities (*i.e.,* marine mammal monitoring and mitigation plan). Your monitoring program must document the effects to these marine mammals and estimate the actual level and type of take. The monitoring requirements provided by the Service will vary depending on the activity, the location, and the time of year.

(3) A site-specific polar bear and/or walrus awareness and interaction plan. A polar bear interaction plan for each operation will outline the steps the applicant will take to limit human–bear interactions, increase site safety, and minimize impacts to bears.

(4) A Plan of Cooperation (POC) to mitigate potential conflicts between the proposed activity and subsistence hunting, where relevant. Applicants must consult with potentially affected subsistence communities along the Beaufort Sea coast (Kaktovik, Nuiqsut, and Barrow) and appropriate subsistence user organizations (the Eskimo Walrus Commission and the Alaska Nanuuq (polar bear) Commission) to discuss the location, timing, and methods of proposed operations and support activities and identify any potential conflicts with subsistence walrus and polar bear hunting activities in the communities. Applications for Letters of Authorization must include documentation of all consultations with potentially affected user groups. Documentation must include a summary of any concerns identified by

community members and hunter organizations, and the applicant's responses to identified concerns. Some of these measures may include, but are not limited to, mitigation measures described in § 18.128.

§ 18.125 What criteria does the Service use to evaluate Letter of Authorization requests?

(a) We will evaluate each request for a Letter of Authorization based on the specific activity and the specific geographic location. We will determine whether the level of activity identified in the request exceeds that analyzed by us in considering the number of animals likely to be taken and evaluating whether there will be a negligible impact on the species or an adverse impact on the availability of the species for subsistence uses. If the level of activity is greater, we will reevaluate our findings to determine if those findings continue to be appropriate based on the greater level of activity that you have requested. Depending on the results of the evaluation, we may grant the authorization, add further conditions, or deny the authorization.

(b) In accordance with § 18.27(f)(5) of subpart C of this part, we will make decisions concerning withdrawals of Letters of Authorization, either on an individual or class basis, only after notice and opportunity for public comment.

(c) The requirement for notice and public comment in paragraph (b) of this section will not apply should we determine that an emergency exists that poses a significant risk to the well-being of the species or stocks of polar bears or Pacific walruses.

§ 18.126 What does a Letter of Authorization allow?

(a) Your Letter of Authorization may allow the nonlethal incidental, but not intentional, take of polar bears and Pacific walruses when you are carrying out one or more of the following activities:

(1) Conducting geological and geophysical surveys and associated activities;

(2) Drilling exploratory wells and associated activities;

(3) Developing oil fields and associated activities;

(4) Drilling production wells and performing production support operations;

(5) Conducting environmental monitoring activities associated with exploration, development, and production activities to determine specific impacts of each activity;

(6) Conducting restoration, remediation, demobilization programs, and associated activities.

(b) Each Letter of Authorization will identify conditions or methods that are specific to the activity and location.

§ 18.127 What activities are prohibited?

(a) Intentional take and lethal incidental take of polar bears or Pacific walruses; and

(b) Any take that fails to comply with this part or with the terms and conditions of your Letter of Authorization.

§ 18.128 What are the mitigation, monitoring, and reporting requirements?

(a) *Mitigation.* Holders of a Letter of Authorization must use methods and conduct activities in a manner that minimizes to the greatest extent practicable adverse impacts on walruses and polar bears, their habitat, and on the availability of these marine mammals for subsistence uses. Dynamic management approaches, such as temporal or spatial limitations in response to the presence of marine mammals in a particular place or time or the occurrence of marine mammals engaged in a particularly sensitive activity (such as feeding), must be used to avoid or minimize interactions with polar bears, walruses, and subsistence users of these resources.

(1) *All applicants.* (i) We require holders of Letters of Authorization to cooperate with us and other designated Federal, State, and local agencies to monitor the impacts of oil and gas exploration, development, and production activities on polar bears and Pacific walruses.

(ii) Holders of Letters of Authorization must designate a qualified individual or individuals to observe, record, and report on the effects of their activities on polar bears and Pacific walruses.

(iii) Holders of Letters of Authorization must have an approved polar bear and/or walrus interaction plan on file with the Service and onsite, and polar bear awareness training will also be required of certain personnel. Interaction plans must include:

(A) The type of activity and, where and when the activity will occur, *i.e.,* a plan of operation;

(B) A food and waste management plan;

(C) Personnel training materials and procedures;

(D) Site at-risk locations and situations;

(E) Walrus and bear observation and reporting procedures; and

(F) Bear and walrus avoidance and encounter procedures.

(iv) All applicants for a Letter of Authorization must contact affected subsistence communities to discuss potential conflicts caused by location, timing, and methods of proposed operations and submit to us a record of communication that documents these discussions. If appropriate, the applicant for a Letter of Authorization must also submit to us a POC that ensures that activities will not interfere with subsistence hunting and that adverse effects on the availability of polar bear or Pacific walruses are minimized (see § 18.124(c)(4)).

(v) If deemed appropriate by the Service, holders of a Letter of Authorization will be required to hire and train polar bear monitors to alert crew of the presence of polar bears and initiate adaptive mitigation responses.

(2) *Onshore activities.* (i) *Efforts to minimize disturbance around known polar bear dens.*—Holders of a Letter of Authorization must take efforts to limit disturbance around known polar bear dens.

(ii) *Efforts to locate polar bear dens.*—Holders of a Letter of Authorization seeking to carry out onshore exploration activities in known or suspected polar bear denning habitat during the denning season (November–April) must make efforts to locate occupied polar bear dens within and near proposed areas of operation, utilizing appropriate tools, such as, forward-looking infrared (FLIR) imagery and/or polar bear scent-trained dogs. All observed or suspected polar bear dens must be reported to the Service prior to the initiation of activities.

(iii) *Exclusion zone around known polar bear dens.*—Operators must observe a 1.6-km (1-mi) operational exclusion zone around all known polar bear dens during the denning season (November–April, or until the female and cubs leave the areas). Should previously unknown occupied dens be discovered within 1.6 km (1 mi) of activities, work must cease and the Service contacted for guidance. The Service will evaluate these instances on a case-by-case basis to determine the appropriate action. Potential actions may range from cessation or modification of work to conducting additional monitoring, and the holder of the authorization must comply with any additional measures specified.

(iv) *Use of a den habitat map developed by the USGS.*—A map of potential coastal polar bear denning habitat can be found at: *http://alaska.usgs.gov/science/biology/polar_bears/pubs.html.* This measure ensures that the location of potential polar bear dens is considered when

conducting activities in the coastal areas of the Beaufort Sea.

(v) *Timing restrictions.*—Operators must restrict the timing of their activity to limit disturbance around dens.

(3) *Operating conditions for operational and support vessels.* (i) Operational and support vessels must be staffed with dedicated marine mammal observers to alert crew of the presence of walruses and polar bears and initiate adaptive mitigation responses.

(ii) At all times, vessels must maintain the maximum distance possible from concentrations of walruses or polar bears. Under no circumstances, other than an emergency, should any vessel approach within an 805-m (0.5-mi) radius of walruses or polar bears observed on land or ice.

(iii) Vessel operators must take every precaution to avoid harassment of concentrations of feeding walruses when a vessel is operating near these animals. Vessels should reduce speed and maintain a minimum 805-m (0.5-mi) operational exclusion zone around feeding walrus groups. Vessels may not be operated in such a way as to separate members of a group of walruses from other members of the group. When weather conditions require, such as when visibility drops, vessels should adjust speed accordingly to avoid the likelihood of injury to walruses.

(iv) All vessels shall avoid areas of active or anticipated walrus or polar bear hunting activity as determined through community consultations.

(v) We may require the use of trained marine mammal monitors on the site of the activity or on board drill ships, drill rigs, aircraft, icebreakers, or other support vessels or vehicles to monitor the impacts of Industry's activity on polar bear and Pacific walruses.

(4) *Operating conditions for aircraft.* (i) Operators of support aircraft should, at all times, conduct their activities at the maximum distance possible from concentrations of walruses or polar bears.

(ii) Under no circumstances, other than an emergency, should aircraft operate at an altitude lower than 457 m (1,500 ft) within 805 m (0.5 mi) of walruses or polar bears observed on ice or land. Helicopters may not hover or circle above such areas or within 805 m (0.5 mile) of such areas. When weather conditions do not allow a 457-m (1,500-ft) flying altitude, such as during severe storms or when cloud cover is low, aircraft may be operated below the 457-m (1,500-ft) altitude stipulated above. However, when aircraft are operated at altitudes below 457 m (1,500 ft) because of weather conditions, the operator must avoid areas of known walrus and polar bear concentrations and should take precautions to avoid flying directly over or within 805 m (0.5 mile) of these areas.

(iii) Plan all aircraft routes to minimize any potential conflict with active or anticipated walrus or polar bear hunting activity as determined through community consultations.

(5) *Additional mitigation measures for offshore seismic surveys.* Any offshore exploration activity expected to include the production of pulsed underwater sounds with sound source levels ≥ 160 dB re 1 μPa will be required to establish and monitor acoustic exclusion and disturbance zones and implement adaptive mitigation measures as follows:

(i) *Monitor zones.* Establish and monitor with trained marine mammal observers an acoustically verified exclusion zone for walruses surrounding seismic airgun arrays where the received level would be ≥ 180 dB re 1 μPa; an acoustically verified exclusion zone for polar bear surrounding seismic airgun arrays where the received level would be ≥ 190 dB re 1 μPa; and an acoustically verified walrus disturbance zone ahead of and perpendicular to the seismic vessel track where the received level would be ≥ 160 dB re 1 μPa.

(ii) *Ramp-up procedures.* For all seismic surveys, including airgun testing, use the following ramp-up procedures to allow marine mammals to depart the exclusion zone before seismic surveying begins:

(A) Visually monitor the exclusion zone and adjacent waters for the absence of polar bears and walruses for at least 30 minutes before initiating ramp-up procedures. If no polar bears or walruses are detected, you may initiate ramp-up procedures. Do not initiate ramp-up procedures at night or when you cannot visually monitor the exclusion zone for marine mammals.

(B) Initiate ramp-up procedures by firing a single airgun. The preferred airgun to begin with should be the smallest airgun, in terms of energy output (dB) and volume (in^3).

(C) Continue ramp-up by gradually activating additional airguns over a period of at least 20 minutes, but no longer than 40 minutes, until the desired operating level of the airgun array is obtained.

(iii) *Power down/Shut down.* Immediately power down or shut down the seismic airgun array and/or other acoustic sources whenever any walruses are sighted approaching close to or within the area delineated by the 180–dB re 1 μPa walrus exclusion zone, or polar bears are sighted approaching close to or within the area delineated by the 190-dB re 1 μPa polar bear exclusion zone. If the power-down operation cannot reduce the received sound pressure level to 180-dB re 1 μPa (walrus) or 190-dB re 1 μPa (polar bears), the operator must immediately shut down the seismic airgun array and/or other acoustic sources.

(iv) *Emergency shut down.* If observations are made or credible reports are received that one or more walruses and/or polar bears are within the area of the seismic survey and are in an injured or mortal state, or are indicating acute distress due to seismic noise, the seismic airgun array will be immediately shut down and the Service contacted. The airgun array will not be restarted until review and approval has been given by the Service. The ramp-up procedures provided in paragraph (a)(5)(ii) of this section must be followed when restarting.

(v) *Adaptive response for walrus aggregations.* Whenever an aggregation of 12 or more walruses are detected within an acoustically verified 160-dB re 1 μPa disturbance zone ahead of or perpendicular to the seismic vessel track, the holder of this Authorization must:

(A) Immediately power down or shutdown the seismic airgun array and/or other acoustic sources to ensure sound pressure levels at the shortest distance to the aggregation do not exceed 160-dB re 1 μPa; and

(B) Not proceed with powering up the seismic airgun array until it can be established that there are no walrus aggregations within the 160-dB zone based upon ship course, direction, and distance from last sighting. If shutdown was required, the ramp-up procedures provided in paragraph (a)(5)(ii) of this section must be followed when restarting.

(6) *Mitigation measures for the subsistence use of walruses and polar bears.* Holders of Letters of Authorization must conduct their activities in a manner that, to the greatest extent practicable, minimizes adverse impacts on the availability of Pacific walruses and polar bears for subsistence uses.

(i) *Community Consultation.* Prior to receipt of a Letter of Authorization, applicants must consult with potentially affected communities and appropriate subsistence user organizations to discuss potential conflicts with subsistence walrus and polar bear hunting caused by the location, timing, and methods of proposed operations and support activities (see § 18.124(c)(4) for details). If community concerns suggest that the proposed activities may have an adverse impact on the

subsistence uses of these species, the applicant must address conflict avoidance issues through a POC as described below.

(ii) *Plan of Cooperation (POC).* Where prescribed, holders of Letters of Authorization will be required to develop and implement a Service-approved POC. The POC must include:

(A) A description of the procedures by which the holder of the Letter of Authorization will work and consult with potentially affected subsistence hunters; and

(B) A description of specific measures that have been or will be taken to avoid or minimize interference with subsistence hunting of walruses and polar bears and to ensure continued availability of the species for subsistence use.

(C) The Service will review the POC to ensure that any potential adverse effects on the availability of the animals are minimized. The Service will reject POCs if they do not provide adequate safeguards to ensure the least practicable adverse impact on the availability of walruses and polar bears for subsistence use.

(b) *Monitoring.* Depending on the location, timing, and nature of proposed activities, holders of Letters of Authorization will be required to:

(1) Maintain trained, Service-approved, onsite observers to carry out monitoring programs for polar bears and walruses necessary for initiating adaptive mitigation responses.

(i) For offshore activities, Marine Mammal Observers (MMOs) will be required on board all operational and support vessels to alert crew of the presence of walruses and polar bears and initiate adaptive mitigation responses identified in paragraph (a) of this section, and to carry out specified monitoring activities identified in the marine mammal monitoring and mitigation plan (see paragraph (b)(2) of this section) necessary to evaluate the impact of authorized activities on walruses, polar bears, and the subsistence use of these subsistence resources. The MMOs must have completed a marine mammal observer training course approved by the Service.

(ii) Polar bear monitors—Polar bear monitors will be required under the monitoring plan if polar bears are known to frequent the area or known polar bear dens are present in the area. Monitors will act as an early detection system in regard to proximate bear activity to Industry facilities.

(2) Develop and implement a site-specific, Service-approved, marine mammal monitoring and mitigation plan to monitor and evaluate the effects of authorized activities on polar bears, walruses, and the subsistence use of these resources. The marine mammal monitoring and mitigation plan must enumerate the number of walruses and polar bears encountered during specified activities, estimate the number of incidental takes that occurred during specified exploration activities, and evaluate the effectiveness of prescribed mitigation measures.

(3) Cooperate with the Service and other designated Federal, State, and local agencies to monitor the impacts of oil and gas activities in the Beaufort Sea on walruses or polar bears. Where insufficient information exists to evaluate the potential effects of proposed activities on walruses, polar bears, and the subsistence use of these resources, holders of Letters of Authorization may be required to participate in joint monitoring and/or research efforts to address these information needs and insure the least practicable impact to these resources. Information needs in the Beaufort Sea include, but are not limited to:

(i) Distribution, abundance, and habitat use patterns of polar bears, and to a lesser extent walruses in offshore environments; and

(ii) Cumulative effects of multiple simultaneous operations on polar bears and to a lesser extent walruses.

(c) *Reporting requirements.* Holders of Letters of Authorization must report the results of specified monitoring activities to the Service's Alaska Regional director (see 50 CFR 2.2 for address).

(1) For exploratory and development activities, holders of a Letter of Authorization must submit a report to our Alaska Regional Director (*Attn:* Marine Mammals Management Office) within 90 days after completion of activities. For production activities, holders of a Letter of Authorization must submit a report to our Alaska Regional Director (Attn: Marine Mammals Management Office) by January 15 for the preceding year's activities. Reports must include, at a minimum, the following information:

(i) Dates and times of activity;

(ii) Dates and locations of polar bear or Pacific walrus activity as related to the monitoring activity; and

(iii) Results of the monitoring activities required under paragraph (c)(1)(iv) of this section, including an estimated level of take.

(iv) Monitoring requirements include, but are not limited to:

(A) For all activities, all sightings of polar bears must be recorded. Information within the sighting report will include, but is not limited to:

(*1*) Date, time, and location of observation;

(*2*) Number of bears: sex and age;

(*3*) Observer name and contact information;

(*4*) Weather, visibility, and ice conditions at the time of observation;

(*5*) Estimated closest point of approach for bears from personnel and facilities;

(*6*) Industry activity at time of sighting, possible attractants present;

(*7*) Bear behavior;

(*8*) Description of the encounter;

(*9*) Duration of the encounter; and

(*10*) Actions taken.

(B) [Reserved].

(v) Activities within the coast of the geographic region may incorporate daily polar bear watch logs.

(2) *In-season monitoring reports for offshore exploration activities*—(i) *Activity progress reports.* Operators must keep the Service informed on the progress of authorized activities by:

(A) Notifying the Service at least 48 hours prior to the onset of activities;

(B) Providing weekly progress reports of authorized activities noting any significant changes in operating state and or location; and

(C) Notifying the Service within 48 hours of ending activity.

(ii) *Walrus observation reports.* The operator must report, on a weekly basis, all observations of walruses during any Industry operation. Information within the observation report will include, but is not limited to:

(A) Date, time, and location of each walrus sighting;

(B) Number of walruses: sex and age;

(C) Observer name and contact information;

(D) Weather, visibility, and ice conditions at the time of observation;

(E) Estimated range at closest approach;

(F) Industry activity at time of sighting;

(G) Behavior of animals sighted;

(H) Description of the encounter;

(I) Duration of the encounter; and

(J) Actions taken.

(iii) *Polar bear observation reports.* The operator must report, within 24 hours, all observations of polar bears during any Industry operation. Information within the observation report will include, but is not limited to:

(A) Date, time, and location of observation;

(B) Number of bears: sex and age;

(C) Observer name and contact information;

(D) Weather, visibility, and ice conditions at the time of observation;

(E) Estimated closest point of approach for bears from personnel and facilities;

(F) Industry activity at time of sighting, possible attractants present;

(G) Bear behavior;

(H) Description of the encounter;

(I) Duration of the encounter; and

(J) Actions taken.

(iv) *Notification of incident report.* Reports should include all information specified under the species observation report, as well as a full written description of the encounter and actions taken by the operator. The operator must report:

(A) Any incidental lethal take or injury of a polar bear or walrus immediately; and

(B) Observations of walruses or polar bears within prescribed mitigation-monitoring zones to the Service within 24 hours.

(3) *After-action monitoring reports.* The results of monitoring efforts identified in the marine mammal monitoring and mitigation plan must be submitted to the Service for review within 90 days of completing the year's activities. Results must include, but are not limited to, the following information:

(i) A summary of monitoring effort including: total hours, total distances, and distribution through study period;

(ii) Analysis of factors affecting the visibility and detectability of polar bears and walruses by specified monitoring;

(iii) Analysis of the distribution, abundance, and behavior of polar bear and walrus sightings in relation to date, location, ice conditions and operational state; and

(iv) Estimates of take based on density estimates derived from monitoring and survey efforts.

§ 18.129 What are the information collection requirements?

(a) We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The Office of Management and Budget has approved the collection of information contained in this subpart and assigned control number 1018–0070. You must respond to this information collection request to obtain a benefit pursuant to section 101(a)(5) of the Marine Mammal Protection Act. We will use the information to:

(1) Evaluate the application and determine whether or not to issue specific Letters of Authorization; and

(2) Monitor impacts of activities conducted under the Letters of Authorization.

(b) You should direct comments regarding the burden estimate or any other aspect of this requirement to the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, Department of the Interior, Mail Stop 2042–PDM, 1849 C Street, NW., Washington, DC 20240.

Dated: July 14, 2011.

Eileen Sobeck,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2011–19296 Filed 8–2–11; 8:45 am]

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